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Title	Can the State be held accountable for water pollution? A critical analysis of legal alternatives available to prospective litigants
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Dissertation topic

Can organs of state held liable for water pollution, especially in the context of water pollution as a result of untreated sewerage? If so, what statutes are applicable to bring government to account?

What are the appropriate remedies that litigants should seek by means of court application or otherwise?

To what extent would resource and capacity constraints in government constitute a valid defence against such bureaucratic negligence or inaction?

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1. Introduction and background

Water is considered to be one of the most essential of all natural resources[1] and its importance in the perpetuation of life is incontrovertible. The 'human poverty index' formulated by the United Nations Development Programme, lists a decent standard of living as one of the three essentials for human life, which in turn is determined by, amongst other, access to safe water. Water is one of the key resources determining the health and wealth of a nation resulting in management of the resource to ensure sustainable use being 'vital'.[2] The United Nations Committee on Economic, Social and Cultural Rights significantly links the right to water, as a limited natural resource, the enjoyment of health and other human rights by stating that the right to water is indispensable to leading a life in human dignity and is a prerequisite for the realization of other human rights.[3]

Assuming current economic and population growth, it is estimated that by 2030 water supplies will only satisfy 60 percent of global demand and less than 50 percent in developing regions, including South Africa, where water supply is already under stress.[4] Blignaut and Van Heerden describe our water situation as 'precarious'.[5] The situation is further exacerbated by the uneven distribution of water which engenders water scarcity, which in turn induces more stringent rules for water use.[6] Blignaut and Van Heerden[7] state that 'the availability of water of acceptable quality is predicted to be the single greatest and most urgent development constraint facing South Africa'.

South Africa is facing 'looming water shortages combined with water quality issues'. As a 'water stressed' country, pollution of limited freshwater resources is a priority concern for

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[1] Department of Water Affairs and Forestry 'White paper on a National Water Policy for South Africa' at 13 (hereafter referred to as 'the DWAF report').

[2] Soltau, Friedrich 'Environmental Justice, Water Rights and Property Part II: Natural Resource Conservation and Utilisation' (1999) Acta Juridica at 229 and 235.

[3] United Nations document E/C.12/2002/11, paragraph 1.

[4] McKinsey and Co '*McKinsey Quarterly*' 2010 Number 1 at 67-68; DWAF report supra note 1 at 13; Kidd, Michael 'Particular Focal Areas: Water, Climate Change, Soil, Mountains and Energy' (2006) 13 *SAJELP* at 176-177.

[5] Blignaut, James and van Heerden, Jan 'The Impact of Water Scarcity on Economic Development Initiatives' 35(4) (2009) Water SA 415-420 at 415.

[6] Tewari, DD 'A Detailed Analysis of Evolution of Water Rights in South Africa: An Account of Three and a Half Centuries from 1652 AD to Present' (2009) 35(5) *Water SA* 693-709.

[7] Blignaut and Van Heerden supra note 5 at 416.

South Africa.[8] This is echoed by Strydom and King[9] who state that the conservation and protection of our water resources and the prevention or treatment of water pollution are of critical importance.

Carden *et al*[10] state that in South Africa approximately 20 million people live without access to on-site waterborne sanitation. The result is that grey water, i.e. wastewater produced from household processes, is disposed of into the ground outside dwellings. This pollution load, particularly from more densely populated informal settlements 'has the potential to create a host of environmental and health impacts.' The authors state that the link between poor sanitation and ill health is well-known; 'for example the World Health Organisation estimates that diarrhoeal diseases are responsible for over a quarter of the deaths of children in the world, and that 80% of these deaths are as a result of a lack of adequate water and sanitation'.[11] Dr Jo Barnes from the University of Stellenbosch sampled the storm water drain along Victoria Rd in Hout Bay (the area below Imizamu Yethu) and found 63 million E. coli/100ml of sampled water. This is regarded as 'gross contamination of the storm water with feaces well above the accepted level of 1000ml E.coli/100ml for safe contact'.[12]

The above background illustrating the importance of water to human life and the precariousness of South Africa's water resources makes the increasing incidence of water pollution more worrying. Recent events featured in the press indicate the pervasiveness of the problem: In Hout Bay, the Disa River is allegedly being polluted and contaminated due to, *inter alia*, untreated sewerage emanating from Imizamu Yethu and Dontse Yahke, informal settlements on the eastern slopes of Hout Bay.[13] The Hermanus Ratepayers Association reported pollution of the Klein River between 27 December 2009 and 28 January 2010 due to, *inter alia*, a sewerage spill.[14] The South Africa Water Research

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[8] South African Country Report for the Eighteenth Session of the United Nations Commission on Sustainable Development (CSD-18) at 11. http://www.un.org/esa/dsd/dsd_aofw_ni/ni_pdfs/NationalReports/south_africa/SouthAfricanCSD18CountryReport.pdf last accessed 19 June 2010.

[9] Strydom, HA and King, ND (eds) Fuggle and Rabie '*Environmental Management in South Africa*' (2009) Juta and Co Ltd at 630.

[10] Carden, Kirsty et al 'The Use and Disposal of Greywater in the Non-sewered Areas of South Africa: Part 1 – Quantifying the Greywater Generated and Assessing its Quality' (2007) 33(4) *Water SA* 425-432 at 425

[11] Carden supra note 10 at 425.

[12] O'Riain, Dr M Justin 'Narrative to accompany photographic evidence of the known causes of pollution entering the Hout Bay River from Imizamo Yethu, erf 1509 and erf 2848 that are currently polluting the within Hout Bay, South Africa' 6 August 2010.

[13] See http://www.houtbay.org.za/SupplementHoutAbout.html#PoisonDisa (last accessed on 23 May 2010).

[14] http://www.ratepayers.co.za/index.php?option=com_contentandtask=viewandid=84andItemid=57 last accessed 23 May 2010.

Commission[15] states that 'river pollution remains one of the biggest challenges to South African water resources' and refers to the pollution of the Eerste River as a result of two of its tributaries, the Kuilsriver and Plankenberg, which are both 'highly polluted by sewage from informal settlements, industries and agricultural practices along its banks'. Save the Vaal, an environmental action group highlighted similar issues with regard to the Emfuleni municipality and its dumping of untreated sewerage into the Vaal River,[16] the Transvaal Agricultural Union is taking legal action against certain government departments as a result of failure to prevent water pollution;[17] and finally but probably most damning of all, is the 'Green Drop' report released by the Department of Water and Environmental Affairs which indicates that 55% of municipalities' sewerage facilities were inadequate.[18] The common thread in the above incidences of water pollution appears to be the role of various organs of state in either causing the pollution or allowing it to continue.

The Government under the new constitutional dispensation has recognized the right to an environment[19] that is not harmful to health or well-being as a basic human right in section 24 of the Constitution of the Republic of South Africa ('the Constitution').[20] Notwithstanding that we are an arid country on the threshold of the internationally used definition of 'water stressed',[21] we are one of the few countries to recognize a right to sufficient water as is contained in section 27(1)(b) of the Constitution.[22] The Constitution by virtue of section 24(b) obliges government to protect the environment through legislative and other measures. More specifically, government, in recognizing the scarcity and importance of water to all, and given the historic imbalances in allowing access to water[23], has recognized that the legal dispensation with regard to water rights and access needs a significant change. It is now recognized that water is a resource that belongs to all and the Minister of Water and Environmental Affairs acts as custodian of this scarce resource.[24]

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[15] http://www.wrc.org.za/News/Pages/Concernedaboutthehealthofourrivers.aspx (last accessed 29 July 2010).
[16] Save the Vaal: http://www.save.org.za/happenings/index.html last accessed 12 May 2010.
[17] http://www.nwf.za.net/images/stories/NWF/Hoof_Klagstaat.pdf last accessed 12 May 2010.
[18] Business report 30 April 2010 and http://www.dwaf.gov.za/Documents/GreenDropReport.pdf at 4 last accessed 23 May 2010.
[19] The meaning of the term 'environment' is discussed in more detail in paragraph 2.1.1.1 below.
[20] Act 108 of 1996.
[21] DWAF report supra note 1 at 13.
[22] Stewart, Linda and Horsten, Debra 'The Role of Sustainability in the Adjudication of the Right to Access to Adequate Water' (2009) 24 (1) *SAPR/PL* at 488.
[23] DWAF report supra note 1 at 15.
[24] Section 3 of the National Water Act 36 of 1998 ('NWA').

Whilst mining, agriculture, and industry clearly contribute to water pollution[25] and as such may violate the constitutional rights outlined above, this paper seeks to determine to what extent can organs of state, by virtue of their actions or omissions, be held liable for water pollution and specifically water pollution as a result of untreated sewerage emanating from informal settlements contaminating our rivers. In answering this question, the relevant provisions of the Constitution, environmental legislation promulgated to give effect to the constitutional provisions and the common law will be analysed in order to establish the requirements for liability, and finally whether defences may be raised to successfully rebut the resultant liability.

2. Establishing a case for liability

2.1. Constitution

The pollution of our rivers may certainly be deplorable and worrying from a scientific perspective. In order to determine whether this state of affairs is legally, as opposed to merely morally reprehensible, the starting point of the enquiry should be the relevant provisions of the Constitution as it is the supreme law of South Africa as set out in section 1(c) and 2 of the Constitution. Does the water pollution in the present context raise constitutional issues, i.e. does it violate any constitutional rights as contained in the Bill of Rights, described by some as 'expansive and modern'? [26] Furthermore, does it perhaps violate more than one constitutional right in which case the question needs to be asked as to how to counterbalance these constitutional provisions if they are competing or are they in fact mutually re-enforcing? Public interest litigation aimed at environmental protection has historically been problematic; accordingly the *locus standi* provisions contained in the Constitution are analysed to determine what the requirements are that prospective litigants would have to comply with in order to have legal standing.

[25] DWAF report supra note 1 at 6, White Paper on Environmental Management Policy Department of Environment Affairs and Tourism July 1997.

[26] Bekink, Bernard '*Principles of South African Local Government Law*' (2006) LexisNexis Butterworths at 3.

2.1.1. The environmental right

2.1.1.1. The first part: the right

Does water pollution emanating from informal settlements constitute a violation of the constitutional environmental right contained in section 24? This section affords everyone 'the right to an environment that is not harmful to their health or well-being'.

Unless water pollution can be shown to equate to an 'environment' that is 'harmful' to 'health' or 'well-being', no violation of the constitutional right can be said to have occurred. Whilst it would be easy to conclude that the term 'environment' refers to the polluted river, does the term also extend to the adverse impact on the use and enjoyment of adjacent properties due to *inter alia* stench and not being able to use the river for recreational purposes? Would the stench and alteration of the appearance of the river as a result of the pollution be regarded as sufficiently significant so that it can be said that the environment is detrimental to 'well being'? Does the fact that Hout Bay, for instance, is a tourist destination and at the start of Chapmans Peak scenic drive influence the question as to whether 'well-being' has been affected? Would the 'extent' of violation of the constitutional environmental right be influenced by the fact that the river being polluted, such as the Disa River in Hout Bay not be used for drinking water but only serving an aesthetic and recreational purpose? These issues are discussed below.

The term 'environment' is not defined in the Constitution. Kidd[27] in referring to the dictionary definition of the word concludes that it is a relative concept as it is often defined in relation to circumstances surrounding someone or something.

The term 'environment' is described in the White Paper on Environment Management Policy for SA[28] as referring to *'the conditions and influences under which any individual or thing exists, lives or develops'*. These conditions and influences, apart from the natural environment comprising renewable and non-renewable natural resources, include the social,

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[27] Kidd, Michael *'Environmental Law'* (2008) Juta and Co Ltd at 1.

[28] Issued by the Department of Environmental Affairs and Tourism in July 1997 accessed via http://www.environment.gov.za/PolLeg/WhitePapers/EnvMgmt.htm White Paper on Environmental Management Policy for SA at par 1 last accessed 7 June 2010.

political, cultural, economic, working and other factors such as value systems that determine people's place in, interaction with and influence on the environment. The White Paper furthermore states that culture, economic considerations, social systems, politics and value systems determine the interaction between people and the environment, the use of natural resources, and the values and meanings that people attach to life forms, ecological systems, physical and cultural landscapes and places. People are part of the environment and are at the centre of concerns for its sustainability.

The Environment Conservation Act[29] ('ECA') contains a definition of the environment, which has not been repealed by NEMA and may still be used to apply unrepealed ECA provisions as it illustrates the intention of the legislature. This reads '*the aggregate of surrounding objects, conditions and influences that influence the life and habits of man or any other organism or collection of organisms.*' A general environmental policy was issued in terms of section 2(1) of the ECA in 1994. Whilst this policy did not define environment it stated that '*every inhabitant of the Republic of South Africa has the right to live, work and relax in a safe, productive, healthy and aesthetically and culturally acceptable environment.*'

According to Strydom and King[30] the term 'environment' can be interpreted either as relating to a complex of biotic, climatic, soil and other conditions that comprise the immediate habitat of an organism; the physical, chemical and biological surrounding of an organism at any time (the green perspective) or the term could be defined as integrally comprising human beings with the result that social issues may not be separated from the environment ('the brown perspective'). Here the term environment would include resources of aesthetic, historic, scientific, spiritual or social value. In addition, the concept of 'environment' under the brown perspective fuses with the concept of sustainability and sustainable development thereby introducing economic issues to the discourse.

Currie and De Waal[31] point out that the anthropocentric approach to the environment as reflected by the wording of section 24 of the Constitution, recognises that the environment has an impact on humans and *vice versa*. Accordingly, the term 'environment' cannot be limited to the non-human natural environment but must be defined broadly to include the inter-relationships between humans and humans and the natural environment.

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[29] Act 73 of 1989.
[30] Strydom and King supra note 9 at 2-3.
[31] Currie, Iain and De Waal, Johan (eds) '*The Bill of Rights Handbook*' 5ed (2005) Juta and Co Ltd at 525.

The term 'environment' is defined in National Environmental Management Act ('NEMA')[32] as:

'....the surroundings within which humans exist and that are made up of-

(i) the land, water and atmosphere of the earth;

(ii) micro-organisms, plant and animal life;

(iii) any part or combination of (i) and (ii) and the interrelationships among and between them; and

the physical, chemical, aesthetic and cultural properties and conditions of the foregoing that influence human health and well-being;'[33]

Strydom and King[34] propose that a restrictive interpretation of the term 'environment' should be adopted in the constitutional dispensation as the environmental right is not the only right that may be invoked to guarantee acceptable conditions of human life. However, one may be inclined to invoke a more extensive interpretation, especially where such an interpretation will promote the 'spirit, purport and objects' of the Constitution.

In ***Director: Mineral Development, Gauteng Region, and Another v Save the Vaal Environment and Others***[35] the respondents listed certain environmental concerns in the context of an application for an open cast mining licence. These included destruction of a wetland, threat to fauna and flora, noise, dust and water pollution, loss of water quality, and interestingly, decreased property values. The court did not seem to oppose the notion that environmental concerns could include a decrease in property values but only raised the concern whether this resulted in the defendant being an illegal association in the context of The Companies Act[36] comprising of more than 20 persons and carrying on a business. The importance of environmental rights and considerations and the need to change our legal

[32] Act 107 of 1998.
[33] NEMA section 1.
[34] Strydom and King supra note 9 at 5.
[35] 1999 (2) SA 709 (SCA) ('***Save the Vaal***') at paragraph 6.
[36] Act 61 of 1973.

mindset when dealing with environmental concerns was clearly underscored by the court.[37] A similar approach was adopted in ***Capital Park Motors CC and Another v Shell South Africa Marketing (Pty) Ltd and Others***[38] where the term 'environment' was interpreted with reference to socio-economic issues.

Kidd[39] submits that the term 'environment' should be broadly interpreted in line with the dictionary meaning of humans' surroundings to ensure that the right is not unacceptably limited; it should not confine itself purely to the physical environment and should include notions of concern for the aesthetic and spiritual dimension of the natural environment, including the idea of a 'sense of place'.

In ***BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs***[40] the court acknowledged that environmental considerations may have been ignored in the past, but by virtue of section 24 of the Constitution have now been given rightful prominence. It held that the term 'environment' is a composite concept that includes social, economic and cultural considerations; it should include all conditions and influence affecting the life and habits of man.[41] The court in ***BP***[42] cited the decision in ***Save the Vaal***[43] with approval where the court held that our Constitution, by including environmental rights as fundamental, justiciable human rights, by necessary implication requires that environmental considerations be accorded appropriate recognition and respect. The change in ideological climate must be mirrored by a change in our legal and administrative approach to environmental concerns.

The Constitutional Court examined the term 'environment' in the context of section 24 of the Constitution in ***Fuel Retailers Association of SA (Pty) Ltd v Director-General Environmental Management Mpumalanga and others***[44] and held that the term is inextricably linked to social and economic development, as the latter is essential to the well-being of human beings. The acknowledgement that environmental protection must be

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[37] ***Save the Vaal*** supra note 35 at paragraph 20.
[38] Unreported case 3016/05 (T) ('***Capital Park Motors***') at paragraph 15-17.
[39] Kidd supra note 27 at 20.
[40] 2004 (5) SA 124 (W) ('***BP***').
[41] ***BP*** supra note 40 at paragraph 34-37.
[42] ***BP*** supra note 40 at paragraph 30.
[43] ***Save the Vaal*** supra note 35 at paragraph 20.
[44] 2007 (10) BCLR 1059 (CC) ('***Fuel Retailers***') at paragraph 44.

balanced with socio-economic development through the ideal of sustainable development[45] was cited with approval in ***MEC, Department of Agriculture, Conservation and Environment and Another v HTF Developers (Pty) Ltd.***[46]

The next term to be analysed is the impact of water pollution arising from informal settlements on 'health'? Kidd[47] states this is not a novel issue as the right to health (as opposed to health care envisaged in section 27 of the Constitution) has been recognized in terms of the common law as is evident from the decision in ***Verstappen v Port Edward Town Board and others***.[48] Water samples taken from the Disa River in Hout Bay[49] indicate greatly increased levels of E-coli, known to have an adverse impact on human health. As such, the chemical analysis of the polluted water would serve as indication that the pollution is likely to result in a situation that is adverse to health as is required in section 24.

The term 'well-being' as used in section 24 of the Constitution is however, more novel. In ***López Ostra v Spain***[50] the European Court of Human Rights held Spain liable in respect of pollution (in the form of gas fumes, pestilential smells and contamination) emanating from a waste treatment plant on the basis that it constituted a violation of Article 8 of the European Convention on Human Rights.[51] The court explains the link between environmental pollution, health and well-being as follows: 'Naturally, severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health'.[52] Du Plessis[53] accordingly holds the view that the substance of the right to a 'clean environment' is that it requires the maintenance of an environment of a certain quality; the

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[45] The term 'sustainable development' referring to the balancing of environmental concerns and economic development as cited with approval in ***Gabcikovo-Nagymoros Project (Hungary/Slovakia) 37 I.L.M. 162 (1998) 200*** at 140, ***MEC for Agriculture, Conservation, Environment and Land Affairs v Sasol Oil (Pty) Ltd 368/04 (SCA)*** at paragraph 15.

[46] 2008 (2) SA 319 (CC) ('***HTF Developers***') at paragraph 60, 61.

[47] Kidd supra note 27 at 20.

[48] 1994 (3) SA 569 (D) ('***Verstappen***').

[49] O'Riain supra note 12.

[50] 16798/90 [1994] ECHR 46 ('***Lopez Ostra***').

[51] This article affords a right to respect 'for private and family life, home and correspondence' and provides that there shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

[52] ***Lopez Ostra*** supra note 50 at paragraph 51.

[53] Du Plessis, Max 'The Right of the Child to a Clean Environment – Some Exploratory Thoughts' (2004) 11 *SAJELP* at 130 and 133.

concept 'well-being' accordingly is 'open-ended and encompasses the essence of environmental concern, namely, a sense of environmental integrity, i.e. that we ought to utilise the environment in a morally responsible and ethical manner.'

In ***Hichange Investments (Pty) Ltd v Cape Produce Company (Pty) Ltd t/a Pelts Products and Others***[54] the term 'well being' in section 24 of the Constitution was interpreted to include protection from the occupational exposure to pollutants. It is submitted that well-being includes notions of concern for the aesthetic and spiritual dimension of the natural environment, including the idea of a 'sense of place'.[55] Currie and De Waal[56] submit that the term 'well-being' should be widely interpreted and illustrate the difference between well-being and health in that maintenance of biodiversity would for instance be capable of inclusion under the term well-being but not health.

In ***HTF Developers***[57] the court regarded the term 'well-being' as 'encompass[ing] the essence of environmental concern, namely a sense of environmental integrity; a sense that we ought to utilise the environment in a morally responsible and ethical manner. If we abuse the environment, we feel a sense of revulsion akin to the position where a beautiful and unique landscape is destroyed or an animal is cruelly treated.'

Applying the terms 'environment' and 'health' and 'well-being' to water pollution as a result of untreated sewerage emanating from informal settlements would constitute a violation of the environmental right contained in section 24 of the Constitution on a number of grounds: polluted water constitutes part of an environment that is harmful to health, stench emanating from polluted water would offend the concept of well-being, and the adverse impact on property values and the use and enjoyment that neighbouring property owners derive from their properties would be incorporated under the socio-economic aspects of environment. The fact that the rivers being polluted are used primarily for recreational purposes and serve primarily an aesthetic purpose as opposed to forming part of a water catchment area ultimately intended for human consumption does not alter the conclusion that its contamination constitutes a violation of the environmental right. In the context of the water

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[54] 2004 (2) SA 393 (E) (***'Hichange'***).
[55] Glazewski, Jan '*Environmental Law in South Africa*' 2ed (2005) LexisNexis Butterworths at 76-77.
[56] Currie and De Waal supra note 31 at 526.
[57] ***HTF Developers*** supra note 46 at paragraph 18.

pollution in Imizamu Yethu, the concept 'well-being' could be argued as having been impacted adversely as Hout Bay and the adjacent Chapmans Peak is very reliant on tourism and an adverse impact to the aesthetic value of the area would be regarded as adversely impacting well-being.

2.1.1.2. Obligations contained in section 24(b)

Apart from the rights contained in section 24(a), section 24(b) places a duty on government to 'to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that (i) prevent pollution and ecological degradation; (ii) promote conservation and (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development'.

How does this apply in the present context and what is the impact thereof on the state's liability? In particular, what is the obligation on the state to protect the environment through 'other measures'. The Constitutional Court in ***Government of the Republic of South Africa v Grootboom***[58] held that the constitutional obligations on the state cannot be discharged by legislation alone; the state is obliged to act to achieve the intended result, and legislation would have to be supported by appropriate, well-directed policies and programs to be implemented by the executive. The court continued to consider the term 'reasonable' in the context of the right of access to housing in section 26 of the Constitution in that the reasonability of the measures are to be assessed in their 'social, economic and historical context and to consider the capacity of institutions responsible for implementing the program. A housing program must be balanced, flexible (i.e. subject to continuous review), representative of all sectors of society and make appropriate provision for attention to housing crises and to short, medium and long term needs. Furthermore, reasonableness must also be understood in the context of the Bill of Rights as a whole. The measures, in order to be reasonable, cannot leave out of account the degree and extent of the denial of the rights they endeavour to realize.[59]

[58] 2001 (1) SA 46 (CC) ('***Grootboom***') at paragraph 42.
[59] ***Grootboom*** supra note 58 at paragraph 43, 44.

Wesson[60], in analyzing the ***Grootboom*** decision, points out that The Promotion of Administrative Justice Act ('PAJA'),[61] enacted in order to give effect to the constitutional requirement that administrative action should be 'reasonable', 'settles upon a formulation that is reminiscent of Wednesbury: the decision should not be 'so unreasonable that no reasonable person could so have exercised the power or performed the function'. However, in ***Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism***[62], this section was interpreted in light of Lord Cooke's test to state that 'administrative decision will be reviewable if, 'it is one that a reasonable decision-maker could not reach'.[63] Glazewski and Witbooi[64] argue that the reasonableness test utilized in ***Grootboom*** in the context of the right to housing, could find equal application to the right of access to water. It is submitted that it the reasonableness test would find similar application to section 24 of the Constitution.

In the context of socio-economic rights, the state's obligations do not end with the duty to refrain from interfering with these rights, but actually require the state to take positive steps to ensure that the realization of these rights is achieved. In international law, this entails the creation of a legal framework that grants individuals the legal status, rights and privileges that will enable them to pursue their rights. Secondly, it requires the state to implement measures and programmes designed to assist individuals in realising their rights.[65]

In the present context, it is therefore evident that the state does have the obligation to ensure the realization and protection of the environmental right. The application of legislation promulgated to give effect and content to the constitutional obligation in section 24(b) is discussed below. What further remains to be analysed is whether non-compliance with these obligations result in state liability or whether defences such as capacity and resource constraints can validly be raised, which are discussed below.

Having established that the water pollution violates the constitutional environmental right, it needs to be established whether there is an interaction between the environmental and

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[60] Wesson, Murray 'Grootboom and Beyond: Reassessing the Socioeconomic Jurisprudence of the South African Constitutional Court' 2004 (2) *SAJHR* at paragraph 291.
[61] Act 3 of 2000.
[62] 2004 (4) SA 490 (CC) ('***Bato Star***').
[63] ***Grootboom*** supra note 58 at paragraph 44.
[64] Glazewski Jan and Witbooi Emma 'Sustainable Development, Poverty-Alleviation and the Right to 'Sufficient Water' in the New Democratic South Africa' 2006 (13) *SAJELP* at 201 and 205.
[65] Gabru, N 'Some Comments on Water Rights in South Africa' 2005 (1) *PER* at 7.

socio-economic rights, and whether this may impact on the conclusion as to the violation of the environmental right.

2.1.2. Socio economic constitutional rights

The state may argue that the water pollution in informal settlements as a result of inadequate sanitation, whilst violating the environmental right, is an inevitable concomitant of the progressive realisation of socio-economic rights, and that the state should accordingly not be held liable for the pollution. In order to assess the cogency of this argument, the interaction and counterbalancing of these constitutional rights would need to be considered.

It should be firstly be borne in mind that rights contained in the Bill of Rights may be limited as envisaged by section 36 of the Constitution: this requires that the right is limited by a law of general application, that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom and taking into account all relevant factors. Secondly litigation pursuant to the violation of the environmental constitutional right may involve the application of section 32 (dealing with the right of access to information held by the state or other persons, insofar as such information is required to the exercise or protection of any rights) or section 33 (affording everyone the right to administrative action that is lawful, reasonable and procedurally fair). A detailed discussion of these constitutional rights however falls outside the scope of this paper.

Of greater relevance in the present of water pollution as a result of untreated sewerage emanating from an informal settlement, is the interdependence and the need to counter balance the environmental right in conjunction with the right to dignity (section 10), equality (section 9), the right of access to adequate housing (section 26), the property right (section 25) and the right of access to sufficient water (section 27(1)(b)).

Glazewksi and Witbooi[66] concede that the enforcement of socio-economic rights may be difficult; however these rights cannot purely exist on paper but must be translated into reality. The Constitutional Court commented on this difficulty in ***Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of***

[66] Glazewski and Witbooi supra note 64.

South Africa[67] where it was held whilst many will give rise to budgetary implications, such implications cannot be a bar to their justiciability. At the very minimum these rights should be negatively protected from improper invasion.

In the ***BP***[68] decision the court held that 'the constitutional right to environment is on a par with the rights to freedom of trade, occupation, profession and property entrenched in sections 22 and 25 of the Constitution. In any dealings with the physical expressions of property, land and freedom to trade, the environmental rights requirements should be part and parcel of the factors to be considered without any *a priori* grading of the rights. It will require a balancing of rights where competing interests and norms are concerned.'

Currie and De Waal[69] cite ***Grootboom***[70] as support for the interdependency of rights and that the rights should be interpreted in a mutually reinforcing and complimentary manner. Whilst the Constitutional Court had an opportunity to expand on the interaction between the environmental right and other socio-economic rights (notably the right in section 27(1)(b)) in ***Lindiwe Mazibuko and Others v City of Johannesburg and Others***[71] it sadly failed to do so. The decision in ***Grootboom*** would tend to indicate that government cannot seek to escape liability by polarising the environmental and socio-economic rights into an 'either-or but not both' scenario. Further support for this conclusion, it is submitted, can be found in the fact that none of the legislation regulating informal settlements seem to authorise, let alone even suggest, that lack of sanitation in informal settlements can or should be condoned under specific circumstances. The relevant legislation dealing with informal settlements is discussed below[72], suffice to say at this stage that the contention that the environmental degradation as a result of water pollution in informal settlements as a result of inadequate sanitation cannot be defended on the grounds that it constitutes and inevitable concomitant to the gradual realisation of socio-economic rights.

In ***Minister of Public Works v Kyalami Ridge Environmental Association***[73] the court acknowledged the need to reconcile the conflicting rights of access to housing, environment

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[67] 1996 (4) SA 744 (CC) ('***Certification***') at paragraph 78.
[68] ***BP*** supra note 40 at paragraph144.
[69] Currie and De Waal supra note 31 at 529.
[70] ***Grootboom*** supra note 58 at paragraph 22 -24.
[71] CCT 39/09 [2009] ZACC 28 ('***Mazibuko CC***').
[72] Paragraph 2.2.3.
[73] 2001 (3) SA 1151 (CC) ('***Kyalami Ridge***') at paragraphs 28, 71, 102, 108-109.

and the right to property and that the concept of proportionality inherently part of the Bill of Rights would assist in determining what fairness requires. Whilst the comments relating to reconciling of conflicting interests and proportionality are relevant to the present inquiry, the case is distinguishable from the present instance as this paper does not question the existence of the informal settlements and their impact *per se* on the rights of adjacent property owners and the environment. It is purely the environmental degradation as a result of inadequate sanitation that is under discussion. It is submitted that inadequate sanitation in all probability violates the right of access to adequate housing (section 26) and the right of access to sufficient water (section 27(1)(b)). The water pollution with its resultant undesirable consequences in turn may well violate the right of property (section 25) insofar as neighbouring property owners are deprived of the use and enjoyment of their property and may suffer a reduction in property values. It is accordingly submitted that the environmental right being violated and these other socio-economic rights are mutually reinforcing as opposed to needing to be counterbalanced.

Measures required to rehabilitate or prevent environmental degradation and pollution in the context of water pollution as a result of inadequate sanitation and sewerage may require the relocation of residents of the informal settlement whilst these measures are being undertaken. This raises the constitutional rights of these residents (particularly the right of access to housing as provided in section 26(1) and (2) of the Constitution), the provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act ('PIE')[74] enacted to give effect to section 26(3) of the Constitution and how this interacts with the violation of the environmental right. In ***Residents, Joe Slovo Community, Western Cape v Thubelisha Homes and Others***[75], the court had to interpret these provisions and emphasised that the manner in which such relocation is to occur should take cognisance of the dignity of the people concerned.[76]

The provisions of PIE are only applicable if the residents are in unlawful occupation. It was contended[77] on the strength of the decision in ***Rademeyer and Others v Western Districts Council and Others***[78] that the municipality, *inter alia* because it provided water, sanitation

[74] Act 19 of 1998.
[75] CCT 22/08 [2009] ZACC 16 ('***Joe Slovo***').
[76] ***Joe Slovo*** supra note 75 at paragraph 75,119,155,191,209,218, 231, 17.
[77] ***Joe Slovo*** supra note 75 at paragraph 38 and 42.
[78] 1998 (3) SA 1011 (SECLD); [1998] 2 All SA 547 (SE) ('***Rademeyer***').

and other services, had tacitly consented to the occupation by the applicants; accordingly the residents could no longer be regarded as unlawful and hence the provisions of PIE were inapplicable. This was rejected by the court as it held that the city was merely carrying out its 'constitutional mandate and moral duty with responsibility and care'. The court accordingly held that no right of occupation can be inferred in the present circumstances, rendering PIE applicable.[79]

The court accordingly analysed the provisions of section 5 and 6 of PIE to determine whether the relocation was just and equitable. In doing so the court referred to the ***Port Elizabeth Municipality v Various Occupiers***[80] decision where it held that the wording of section 6 of PIE evidenced a very wide discretion afforded to the courts in determining when the relocation is just and equitable: it would take cognisance of the extent to which negotiations occurred, the vulnerability of the occupants, the reasonability of offers of alternative accommodation, the time scales afforded relative to the degree of disruption and the willingness of the occupiers to respond to reasonable alternatives put to them. The court acknowledged that whilst the relocation of the people may be traumatic, it was necessary in order to effect the requisite infrastructural upgrade and that the conduct of the state was not unreasonable, amongst other because the state had offered transport and schooling assistance during the period of relocation. In addition the court noted that as it was the state who owned the land and it was the state that would pay for the construction of housing, it should be afforded some leeway provided it acts reasonably.[81] Whilst the court noted that the state 'could have been more alive to the human factor' and whilst the decision to relocate may not constitute 'best practice', the court will not interfere provided that the state acted reasonably.[82] The court furthermore commented on the duties of affected citizens under these circumstances and encouraged them to be 'pro-active and not purely defensive' and make their 'individual and collective contributions towards the realisation of the benefits and entitlements they claim for themselves'.[83] In similar vein, in ***Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg and***

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[79] ***Rademeyer*** supra note 78 at paragraphs 79 and 85.
[80] [2004] ZACC 7; 2005 (1) SA 217 (CC); 2004 (12) BCLR 1268 (CC) ('***PE Municipality***') at paragraphs 29 and 39.
[81] ***PE Municipality*** supra note 80 at paragraphs 108 and 111.
[82] ***PE Municipality*** supra note 80 at paragraphs 113-114, 174.
[83] ***PE Municipality*** supra note 80 at paragraphs 407-408.

Others[84] the court stressed the need for meaningful engagement between the illegal occupants and the municipality as a precondition in order for the municipality to discharge its constitutional mandate.

Accordingly, in the context of water pollution as a result of inadequate sanitation in informal settlements, it would appear that the need to counterbalance the environmental right with socio-economic rights is limited in the present instance and that the various rights in fact are mutually reinforcing. Caution would however have to be taken to ensure that the socio-economic rights of residents (such as the right to dignity) who need to be temporarily relocated in order to address the environmental degradation by an *in situ* upgrade of infrastructure are protected and afforded due respect and recognition.

2.1.3. Locus standi

The next step is to determine who may approach a court to enforce the constitutional environmental right violated as a result of the water pollution, in other words who has legal standing or *locus standi?* In the context of Hout Bay or other areas affected by water pollution as a result of inadequate sanitation in informal settlements is it individual property owners adjacent to the informal settlement or individual property owners with property on the banks of the polluted river, residents of the informal settlements, environmental action groups, ratepayer associations, or special purpose organizations formed to address the issue such as the Save the Vaal?

The establishment of *locus standi* in environmental interest litigation has historically been problematic but has improved since the enactment of the Constitution. However as is illustrated below, there are still a number of worrying aspects in this regard that prospective litigants wishing to enforce the environmental right should take note of.

2.1.3.1. Common law position

Roman law recognized the *actio popularis* or citizen's action whereby any member of the public could bring an action in the public interest. This approach seems to have been

[84] [2008] ZACC 1; 2008 (2) SA 208 (CC); 2008 (5) BCLR 475 (CC) (***'51 Olivia Road'***) at paragraph 9, 13, 14 and 20.

adopted by South Africa in the last century where the existence of *locus standi* was acknowledged in actions dealing with the public interest. Glazewski[85] cites the decision in ***Dell v The Town Council of Cape Town***[86] as example where the plaintiff, by virtue of being a member of the public, was 'entitled' to approach the court.

A more restrictive approach was subsequently adopted by our courts as an individual was generally required to have a special interest peculiar to himself as opposed to an injury sustained by members of the public before being given a hearing.[87] Environmental organizations and pressure groups would typically be held to lack *locus standi* unless they were able to show that the organization itself was adversely affected. Whilst a different approach was adopted by the court on one or two occasions[88], in general, concerned citizens and non-governmental organizations experienced severe obstacles to bring actions concerning environmental threats.[89] In ***Natal Fresh Produce Growers' Association v Agroserve (Pty) Ltd***[90] for instance, notwithstanding that the plaintiff in litigating was carrying out one of its objectives being the protection of the interests of its members, it was held that this at most would amount to an 'indirect' interest in litigation which is insufficient to afford it *locus standi.*

The ***Verstappen***[91]decision similarly illustrates the difficulties encountered by private citizens when litigating in environmental matters. The court held that in order to determine the existence of *locus standi* it needs to be enquired whether the legislature intended the prohibition in the interest of any particular person or class of persons or whether it was prohibited in the general public interest. If the former, the applicant merely had to show that she belonged to that class, if not, the applicant must prove that she has suffered of will suffer special damage as a result of the act. In the case in question the applicant had failed to show that she had suffered some special damage and accordingly was held not to have the requisite *locus standi.*

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[85] Glazewski supra note 55 at 120-121.
[86] 1879 9 Buch 2 at 6.
[87] Glazewski supra note 55 at 121 referring to ***Patz v Green and Co*** 1907 TS 427, ***Bagnall v Colonial Government*** 1907 24 SC 470, ***Dalrymple v Colonial Treasurer*** 1910 TS 372 and in the environmental context ***Von Moltke v Costa Aerosa*** 1975 (1) SA 255 (C) .
[88] ***Society for the Prevention of Cruelty to Animals, Standerton v Nel*** 1988 (4) SA 42 (W).
[89] Currie and De Waal supra note 31 at 523.
[90] 1990 (4) SA 749 (N) ('***Natal Fresh Produce Growers'***) at 758G-759D.
[91] ***Verstappen*** supra note 48 at paragraph 574.

2.1.3.2. Constitutional dispensation

Section 38 of the Constitution specifically affords *locus standi* to persons acting in the public or group interest, or organizations acting on behalf of their members. The SA Law Commission welcomed this liberalization of standing in constitutional litigation, as it believes that legislation is necessary to affect a balance between 'opening the doors of access to justice to the masses and flooding the gates with inappropriate or vexatious litigation.'[92] Section 32 of NEMA attempts to broaden the standing provisions of the common law and is intended to apply where the legal standing provisions afforded by the Constitution will not apply. So has this *really* made a difference and what is the impact thereof in the present instance?

Litigants appeared to be off to a good start. In ***Van Huyssteen NO and others v Minister of Environmental Affairs and Tourism and Others***[93] the court held that the constitutional era heralded a clear intention to put an end to the restrictive approach and ruled that the term 'own interest' in the context of *locus standi* was wide enough to cover an interest as trustee.

In ***Wildlife Society of Southern Africa and others v Minister of Environmental Affairs and Tourism of the Republic of South Africa and Others***[94] the court acknowledged the need to develop the common-law *locus standi* provisions in line with the broader Constitutional provisions. The adherence to the common law principle that a litigant requires a 'sufficient interest' to have legal standing has been interpreted as being a means of protection against 'busybodies, cranks and other mischief-makers'. Pickering J expresses the view that to afford legal standing to bodies such as the first applicant in the present instance would in his view not open the 'floodgates to a torrent of frivolous or vexatious litigation against the State by cranks or busybodies. Should they be tempted to do so, I have no doubt that an appropriate order of costs would soon inhibit their litigious ardour.' His view is that they are more often a 'spectral figure than a reality.'[95]

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[92] South Africa Law Commission Project 88: The Recognition of Class Actions and Public Interest Actions in South Africa at par 3.2.1 and 3.5 at http://www.saflii.org/za/other/zalc/report/1998/5/ last accessed 1 June 2010.

[93] 1995 (9) BCLR 1191 (C) ('***Van Huyssteen***') at paragraph 302.

[94] 1996 (3) SA 1095 (Tk) ('***Wildlife Society***') at paragraph 11055.

[95] ***Wildlife Society*** supra note 94 at paragraph 105.

In ***Minister of Health and Welfare v Woodcarb***[96] Hurt J held that the applicant as the 'person upon whom responsibility for the administration and application of the Act devolves, must implicitly be vested with *locus standi* to seek the assistance of this Court' and accordingly that the applicant had the requisite public interest standing as contemplated in section 7(4) of the Interim Constitution.[97] Similar conclusions were reached In ***Pepcor Retirement Fund and Another v Financial Services Board and Another***[98] and ***Minister of Health v Drums and Pails Reconditioning CC T/A Village Drums and Pails***.[99]

In ***Ferreira v Levin NO***; ***Vryenhoek v Powell NO***[100] the court considered the constitutionality of section 417(2)(b) of the Companies Act[101] in the context of section 25(3) of the Interim Constitution, i.e. the right to a fair trial. The court referred to the undesirability of giving rulings in the abstract on issues which are not the subject of controversy but are of academic interest only.[102] The undesirability stems from the fact that in an adversarial system decisions are best made where a genuine dispute exists. Secondly scarce judicial resources are best applied to real and not hypothetical disputes. Notwithstanding these reservations, the court was of the view that a broad approach should be adopted to standing when it comes to the protection of constitutional rights as it would ensure that these rights are given the full measure of protection to which they are entitled.

After these encouraging decisions, things started to take a turn for the worst. In ***Interim Ward 19 S Council v Premier, Western Cape Province, and Others***[103] the legal standing of a voluntary association formed with the specific purpose of enforcing compliance of certain rezoning conditions was challenged. The court held that for an association to have *locus standi* it must have *universitas.* It is accordingly necessary to look at its constitution, as well as the nature and objects of association. The court cited the other requirements for *locus standi* being perpetual succession, the capacity of acquiring rights and incurring obligations independently of its members and own property. The court in finding that the

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[96] 1996 (3) SA 155 (N) ('***Woodcarb***') at paragraph 159-162 and 164G.
[97] Constitution of the Republic of South Africa Act 200 of 1993.
[98] 2003 (6) SA 38 (SCA) ('***Pepcor Retirement Fund***').
[99] 1997 (3) SA 867 (N) A ('***Village Drums***') at 872C/D--D/E.
[100] 1999 (4) SA 682 (CC) ('***Ferreira v Levin***') at paragraph 164-165.
[101] Act 61 of 1973.
[102] Referring to ***Zantsi v Council of State, Ciskei and Others*** 1995 (4) SA 615 (CC) at paragraph 7.
[103] 1998(3) SA 1056 (C) ('***Interim Ward 19***').

applicant lacked *locus standi* arrived at this decision without reference to section 38 of the Constitution. It is submitted that this decision was incorrectly decided.

The Constitutional Court missed an opportunity to deal expressly with *locus standi* in the context of section 38(c) of the Constitution in ***Kyalami Ridge***[104] as it asks the question whether the class action contemplated in section 38(c) requires the parties to consent to be bound by the outcome and finds that it is 'undesirable' to express any opinion on that issue. The *locus standi* of the environmental and social action group in the ***Earthlife Africa (Cape Town branch) v Eskom Holdings Ltd***[105] was similarly accepted, strangely without explicit reference to section 38 of the Constitution or 32 of NEMA. A similar approach was adopted in ***Seafront for All v MEC, Environmental and Development Planning, Western Cape Provincial Government***[106] where the *locus standi* of a 'voluntary association and juristic person, established by a constitution' acting in its own interest, as well as in the interest of its members, the interest of the public in general and in the interest of protecting the environment' was accepted although the court did not explicitly refer to *locus standi* in its judgement. Whilst these judgements found in favour of the existence of *locus standi,* limited reliance may be placed upon them as the issue was not explicitly considered by the courts.

In ***Tergniet and Toekoms Action Group and others v Outeniqua Kreosootpale (Pty) Ltd and others***[107] the Tergniet and Toekoms Action Group ('TTAG') and thirty four others applied to the Cape High Court for declaratory relief or an interdict against the defendant on the basis of alleged air pollution in contravention of the Atmospheric Pollution Prevention Act ('APPA').[108] It was common cause that TTAG was a voluntary association representing the interests of the residents of the area, that its membership varied, that it did not have a constitution. It was accordingly contended that the first applicant lacked the primary attributes that would endow a *universitas personarum* with *locus standi* in the sense of the capacity to sue, namely perpetual succession, and the capacity to acquire rights and incur obligations. It was contended that notwithstanding that section 38 of the Constitution and section 32 of NEMA have broadened the notion of *locus standi* and would allow a 'group' to act on behalf of others, such group nevertheless needs to possess the capacity to sue in

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[104] ***Kyalami Ridge*** supra note 73 at paragraph 32.
[105] 2006 (2) All SA 632 (W) (***'Earthlife/Eskom'***) at paragraph 2,3.
[106] (15974/2007) high court (CPD) (26 March 2010) (unreported) at paragraph 4 (***'Seafront for All'***).
[107] 10083/2008 (C) (***'Tergniet'***).
[108] Act 45 of 1965.

that it should have a 'substantial and significant' interest in the subject matter. It was alleged that the first applicant lacked such interest.[109] Counsel for the applicant, citing *inter alia* the decisions in ***Rail Commuters Action Group v Transnet Ltd t/a Metrorail***[110] and ***Ferreira v Levin N.O.,***[111] acknowledged that it is not settled in our law that a 'loose association' of people without a constitution would possess *locus standi.* Counsel for the applicant however countered this submission by arguing that the provisions of section 38 of the Constitution 'should be amplified with a view to bestowing standing on groups, especially where they are seeking to enforce legislation passed for the purpose of protecting and promoting constitutionally entrenched fundamental rights' such as the environmental right contained in section 24 of the Constitution. Furthermore this amplification of section 38 of the Constitution should also apply where the applicants are seeking to enforce legislation promulgated to give effect to the constitutional environmental right. It was further contended that this amplification is not essential given the wording of section 32 of NEMA: whilst it tracks the provisions of section 38 of the Constitution, it deviates from it in that it expands the type of litigant that would be bestowed with *locus standi.*[112]

The court considers the provisions of Atmospheric Pollution Prevention Act[113] ('APPA') and reaches the 'inescapable' conclusion that it was promulgated not in the interests of the general public 'but in the interests of persons and communities living in close proximity to any premises where Scheduled processes that resulting the release of noxious or offensive gasses into the atmosphere, are being performed'. The court accordingly finds the existence of *locus standi* of the applicants in their individual capacities *to enforce the provisions of APPA* on the basis that they owned immovable property or reside in the area; accordingly they have shown proximity, and hence they have sustained or reasonably apprehend sustaining actual harm.[114] (my emphasis). The court accordingly, in finding that the residents had *locus standi* to enforce the provisions of APPA, missed an opportunity in finding that TTAG has *locus standi* in terms of section 38 of the Constitution or section 32 of

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[109] ***Tergniet*** supra note 107 at paragraph17-18.

[110] 2005(2) SA 359 (CC) ('***Rail Commuters***'). However in that judgement at paragraph 2 the court did not consider whether the Rail Commuters Action Group had *locus standi* as the defendant did not challenge it and no relief was sought in the interests of the first applicant alone. It therefore appears misleading to cite this case as authority for the fact that the law with regard to *locus standi* in respect of loose associations is unclear.

[111] ***Ferreira v Levin*** supra note 100

[112] ***Tergniet*** supra note 107 at paragraph 19-21.

[113] Act 45 of 1965.

[114] ***Tergniet*** supra note 107 at paragraph 20-21.

NEMA to enforce the provisions of section 24 of the Constitution.

In ***All the Best Trading CC t/a Parkville Motors v SN Nayagar Property Development and Construction***[115] the court incorrectly considered the *locus standi* provisions. The applicant, a filling station owner was opposing the development of what would appear to be a competing filling station nearby. It held that an applicant seeking to protect its commercial interests may not rely upon environmental legislation to do so. Kidd[116] validly points out that this seems to fly in the face of the ***BP***[117] decision which explicitly held that socio-economic considerations are integral to environmental decision-making. What is more baffling, according to Kidd, is the *locus standi* of the applicant was decided in a judgement handed down 6 years after the promulgation of NEMA without reference to the *locus standi* provisions contained in section 32 of NEMA. Kidd points out that section 32 provides that any person or group of persons may seek relief in respect of the breach or threatened breach of any provision of NEMA, in their own interest or the interests of a group. The section does not refers to a 'person's own *environmental* interest' and according to Kidd an applicant seeking to protect a commercial interest who was applying to court for the review of a decision authorized by environmental legislation would have *locus standi*. Similarly in ***Capital Park Motors***[118] it was held that the applicant seeking to challenge the development of a competitor (again a filling station) does have *locus standi* to challenge the development on environmental grounds due to the inclusion of socio-economic considerations in NEMA and ECA. Kidd correctly points out that a similar decision could have been reached more succinctly by relying on section 32 of NEMA directly.

Judicial ignorance of section 32 of NEMA is also evident from ***Merebank Environmental Action Committee v Executive Member of Kwazulu-Natal Council for Agriculture and Environmental Affairs.***[119] Here the Merebank residents who had organized themselves into a committee 'irrespective of what precedes the term committee' were held to lack *locus standi*. Feris submits[120] that the court relied on section 38(e) of the Constitution and ignored

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[115] 2005 3 SA 396 (T) (***'All the Best'***).
[116] Kidd, Michael 'Greening the Judiciary' 2006 (3) *PER* 5-6.
[117] ***BP*** decision supra note 40.
[118] ***Capital Park Motors*** supra note 38.
[119] unreported case 2691/01 (D)(***'Merebank'***).
[120] Feris LA '*Environmental Right and Locus Standi*' in Paterson, Alexander and Kotze, Louis J (eds) '*Environmental Compliance and Enforcement in South Africa*' (2009) Juta and Co Ltd 129-150 at 150.

the dictates of NEMA that provides standing for any person or group of persons seeking relief in the interest of protecting the environment as provided in section 32(1)(e) of NEMA.

Whilst it is evident that ratepayer associations or environmental action groups may have lacked *locus standi* in terms of the common law, this position has changed given the promulgation of section 32 of NEMA and section 38 of the Constitution and in fact, one would have thought, given the plain wording used in those sections. It would appear that our courts have displayed a reluctance to give full effect to the provisions of section 32 of NEMA and section 38 of the Constitution. Interest groups wishing to embark on environmental litigation would be well advised to ensure that they have complied with the guidelines set out in the ***Tergniet***[121] decision insofar as the procedural requirements are concerned and thereby avoid giving a court an escape door to avoid finding the existence of *locus standi.*

The *locus standi* of environmental interest groups or ratepayer associations to bring an application to court to hold an organ of state liable for water pollution as a result of inadequate sewerage in informal settlements, is supported, in addition to the provisions of section 32 of NEMA or section 38 of the Constitution, by the constitutional mandate imposed on local government to encourage the involvement of communities and community organisations in matters of local government as set out in section 152(1)(e) of the Constitution[122] and section 16 Local Government: Municipal Systems Act[123] ('Municipal Systems Act'). Failure to allow an interest group such as the Hout Bay ratepayer association *locus standi* in a legal matter dealing with the alleged non-performance by the City of Cape Town of its duties to address the water pollution arising as a result of the inadequate sanitation and sewerage in Imizamu Yethu seems inconceivable. Prospective litigants may be well advised to expressly raise the relevance of section 152(1)(e) in the context of *locus standi.*

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[121] ***Tergniet*** supra note 107.
[122] Steytler, Nico and De Visser, Jaap *'Local Government Law of South Africa'* (2007) LexisNexisButterworths at 6-3-6-6.
[123] Act 32 of 2000.

2.1.4. Interpreting the Constitution: sections 2, 7, 8 and 39

Having looked at the environmental and socio-economic rights and *locus standi* in the context of the liability of the state as a result of water pollution emanating from inadequate sanitation in informal settlements, there remains certain additional constitutional provisions that may guide the courts in how they interpret and apply the Constitution to the present situation. These are discussed below.

In ***BP***[124] the court took note of the supremacy of the Constitution by virtue of section 2 and in particular, that the obligations imposed by the Constitution 'must be fulfilled'. The court further referred to the centrality of Rights and its foundational values as set out in section 7(1), and the responsibility resting on government to 'respect, promote and fulfill' the rights in the Bill of Rights in section 7(2). In addition, the provisions of section 8(1) were cited by the court in that the provisions of the Bill of Rights bind all organs of state. The court noted that the constitutional rights must be generously interpreted, based on the imperative to do so in section 39 of the Constitution compelling the courts to interpret law so that the spirit, purport and objects of the Bill of Rights will be given effect to.[125]

In the context of the right to life, human dignity, freedom and security of person,[126] the Constitutional Court in ***Carmichele v Minister of Safety and Security and Another***[127] after noting that section 8(1) of the Constitution holds that the Bill of Rights binds all organs of state, held that '...It follows that there is a duty imposed on the state and all of its organs not to perform any act that infringes these rights. In some circumstances there would also be a positive component which obliges the state and its organs to provide appropriate protection to everyone through laws and structures designed to afford such protection.' Furthermore section 8(3) places an obligation on the courts to apply, or if necessary, develop the common law to the extent that legislation does not give effect to a right in the Bill of rights and the court is furthermore empowered to develop the rules of the common law to limit

[124] ***BP*** supra note 40.
[125] ***BP*** supra note 40 at paragraph 26.
[126] Sections 9-12 of the Constitution.
[127] 2001 (10) BCLR 995 (CC) ('***Carmichele***') at paragraph 44.

rights in the Bill of Rights provided that this occurs in accordance with section 36 of the Constitution.

These constitutional provisions are therefore relevant in determining how the environmental right should be interpreted and applied in the present context.

2.1.5. Governance and public administration obligations of the state

The informal settlements in Hout Bay are situated on property belonging to the City of Cape Town, provincial government, and SANparks; liability may depend on exactly on whose land the water pollution originated. The provisions of Schedule 4 and 5 of the Constitution, allocate areas of responsibility to different organs of state in respect of water management, sanitation, the environment and water pollution but leaves issues such as the manner of interaction, the overlapping of responsibilities or the existence of a possible vacuum between the Department of Water and Environmental Affairs and local government unanswered. The co-operative governance provisions of the Constitution as well as Local Government: Municipal Systems Act[128] would therefore need to be analysed to obtain more clarity. A further complicating factor is that the choice of statute in terms of which legal action is instituted, may also influence the choice of defendant. This clearly leaves any potential litigant wishing to hold the state accountable in a deplorable and unenviable situation, which may well be an insurmountable obstacle to litigation.

This chapter considers the provisions of the Constitution dealing with the concept of co-operative governance (section 40-41), the objects, duties and powers of municipalities (section 150-156), the basic values and principles governing public administration (section 195) as well as the allocation of responsibilities (either overlapping or disjointed) among national, provincial and local government relevant to water management, water pollution, sanitation and the environment as set out in Schedule 4 and 5 of the Constitution in order to establish whether it would allow for organs of state to simply be cited as co-defendant without the applicant having to 'apportion' the blame for water pollution arising from inadequate sanitation in informal settlements amongst various organs of state.

[128] Act 32 of 2000.

Sections 40 and 41 of the Constitution introduce the concept of co-operative government. The aspects of co-operative government relevant to the present discussion are the obligations on each sphere of government to secure the well-being of the people of the Republic (section 41(1)(b)), to secure effective, accountable and coherent government (section 41(1)(c)) as well as the requirement to be loyal to the Constitution (section 41(1)(d). It is submitted that the latter requires co-operation amongst the different spheres of government to ensure that inter alia the rights contained in the Bill of Right, including the environmental right, are progressively realized. Section 41(1)(g) further places an obligation on spheres of government not to encroach on each other's territories and to act towards each other in good faith and mutual trust (section 41(1)(h)).

The Constitutional Court in ***Uthukela District Municipality and Others v President of the Republic of South Africa and Others***[129] underscored the importance and content of co-operative government and that inter-governmental disputes should be resolved at political level rather than in court. Similarly in ***Nokotyana and Others v Ekurhuleni Metropolitan Municipality and Others***[130] the importance of bureaucratic efficiency and co-operative government in achieving the realization of socio-economic rights was underscored. In ***Grootboom***[131] the concept of co-operative government was explained by the court in the context of what constitutes reasonable legislative and other measures in the context of section 26 of the Constitution. In particular, it held that that the need for different organs of state to cooperate with each other and clearly allocate responsibilities amongst each other, is a clear concomitant of these principles.[132]

The Constitution has changed the landscape relating to local government significantly. It is bold in the duties and responsibilities it assigns to local government.[133] Section 151 of the Constitution clearly bestows municipalities with new-found independence. Section 152

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[129] 2003 (1) SA 678 (CC) (***'Uthukela'***) at paragraph 14, in this decision the court underscored its previous decision in ***Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa***, 1996 1996 (4) SA 744 (CC), 1996 (10) BCLR 1458 (CC) at para 291 as well as the decision in ***National Gambling Board v Premier of KwaZulu-Natal and Others*** 2002 (2) SA 715 (CC), 2002 (2) BCLR 156 (CC) cited by Woolman Stu L'etat, C'est Moi: Why Provincial Intra-governmental Disputes in South Africa Remain Ungoverned by the Final Constitution and the Intergovernmental Relations Framework Act – and How we can Best Resolve Them' *Law, Democracy and Development* at 63.

[130] (CCT 31/09) [2009] ZACC 33 (***'Nokotyana'***) at paragraph 4.

[131] ***Grootboom*** supra note 58.

[132] ***Grootboom*** supra note 58 at paragraph 39 and 40.

[133] Murray, Christina and Hoffman-Wanderer, Yonina 'The National Council of Provinces and Provincial Intervention in Local Government' (2007) 18(1) *SLR* at 7.

embellishes on this theme and sets lofty ideals as objects of local government, within administrative and financial capacity constraints as qualified in section 152(2): *inter alia* that local government will be accountable (section 152(1)(a)), services are to be provided in a sustainable manner (section 152(1)(b)), furthermore it is an objective of local government to promote a safe and healthy environment (section 152(1)(d)). Section 152(2) sets a proviso to these bold objectives by stating that these objectives are to be determined within the 'financial and administrative capacity' of the local government. National and provincial governments are in terms of section 154(1) of the Constitution obliged to support and strengthen the capacity of municipalities to manage their own affairs, exercise their powers and perform their functions. This is to be achieved by 'legislative and other measures'.

South Africa's 'multi-level' and interdependent system of government is complex relative to a federal system of government where powers are more separated between the different levels of government.[134] The pre-constitutional era was evidenced by a hierarchical separation between the three spheres of government. It has been stressed that the current constitutional situation is one of 'distinctive, interdependent and interrelated spheres of government'.[135] Furthermore, Bekink[136] points out that the Constitution distinguishes between executive authority and the administration of such matters on the other hand.

The obligations on the state in the environmental context should be examined in the context of the values and principles governing public administration as set out in section 195 of the Constitution. In particular the public administration must be 'governed by the democratic values and principles enshrined in the Constitution'. These include a high standard of professional ethics, the efficient, economic and effective use of resources, people's needs must be responded to, public administration must be accountable. These standards are not always achieved in practice, as is evident from the ***Grootboom***[137] judgement.

Water pollution as a result of inadequate sanitation in informal settlements would *prima facie* fly in the face of the 'efficient, economic and effective use of resources' that must be

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[134] Murray and Hoffman-Wanderer supra note 133 at 8.
[135] ***Fedsure Life Assurance Ltd v Greater Johannesburg Metropolitan Council*** 1998 12 1458 (CC) ('***Fedsure***') at paragraphs 35-37.
[136] Bekink supra note 26 at 216.
[137] ***Grootboom*** supra note 58 at paragraph 87-89.

promoted and 'accountability' and responding to people's needs as contemplated in section 195(1)(b), (f) and (e) of the Constitution respectively.

Municipalities are empowered and granted authority by virtue of section 156 of the Constitution to attend to matters listed in part B of Schedule 4 and part B of Schedule 5 to the Constitution. Inter alia these include storm water management systems in built-up areas, water and sanitation services limited to potable water supply systems and domestic waste-water and sewage disposal systems. The 'environment' and 'pollution control' are listed under Schedule 4 resulting in these areas being subject to concurrent national and provincial concurrence. Whilst the management of water is constitutionally a national function and whilst the role of public trustee of our water resources is a national function, aspects of environment and pollution control are concurrent areas of national and provincial responsibility.[138]

National government enjoys exclusive competence in regard to water resources, except to the extent that water and sanitation services are referred to in part B of Schedule 4.[139] This view is shared by Tewari,[140] water is classified as a resource of exclusive national competence as it does not appear in Schedule 4 and 5 of the Constitution, thus confirming its significance to the country.

Local government cannot be absolved from responsibility with regard to water pollution in informal settlements, given the principles of co-operative government and the mandate to promote a safe and healthy environment contained in section 152(1)(d). Local government should embrace their constitutional obligations with the same enthusiasm as they have accepted their increased autonomy and status in terms of the Constitution. Bekink[141] whilst recognizing the problem of manipulation of smaller municipalities, expresses the concern that decentralization or delegation in the context of co-operative governance should not be accompanied by an abandonment of constitutional responsibilities.

Section 100 of the Constitution envisages national intervention in provincial administration, and section 139 envisages provincial intervention in local administration. This remedy could

[138] DWAF report supra note 1 at 12.
[139] Glazewski supra note 55 at 114.
[140] Tewari supra note 6 at 703.
[141] Bekink supra note 26 at 62.

be taken cognisance of in the present instance, for instance should the provincial government be of the view that a local municipality in question does not have the resources etc to deal with water pollution and take over this function perhaps on a temporary basis.

Litigants wishing to hold the state accountable for water pollution as a result of inadequate sanitation, may be well advised to cite the various organs of state as co-defendants on the basis that it is not the defendant's duty or responsibility to second-guess which organs of state should be held liable, or run the risk of their legal challenge be unsuccessful as a result of *lacunae* in the concept of co-operative governance. Based on the above analysis, support for this approach can be inferred from the relevant provisions of the Constitution, analysed above.

2.1.6. Constitutional remedies

Section 172 of the Constitution empowers a court, when deciding a constitutional matter, to make any order that is 'just and equitable'. Furthermore, section 39 requires the courts when interpreting any legislation and when developing the common law, to have regard to the spirit, purports and objects of the Bill of Rights. The question needs to be asked how creatively and with what vigour the courts have embraced these constitutional imperatives.

In ***Fose v Minister of Safety and Security***[142] the Constitutional Court considered the issue of damages pursuant to police assault in the constitutional era and found that there is no reason in principle why 'appropriate relief' as contemplated in section 7(4)(a) of the Interim Constitution should not include an award of damages where such damages are necessary to enforce and protect Chapter 3 rights. The court however was not prepared to award punitive damages on the basis that it would be unlikely to serve as a significant deterrent against individual or systemic repetition of the infringement in question and would be inappropriate given the substantial economic implications in a country with great demands on scarce resources.[143] Of significance to the present discussion is the statement by the court, that it has a particular duty, to ensure that within the bounds of the Constitution, effective relief be granted for the infringement of any chapter 3 rights. It held than an appropriate remedy must mean an effective remedy as the absence of an effective remedy for breach, the values underlying and the rights entrenched in the Constitution cannot be properly upheld or

[142] 1997 (3) SA 786 (CC) ('**Fose**').
[143] ***Fose*** supra note 142 at paragraphs 60 and 71.

enhanced. Given that so few people in this country have the means to enforce their rights through the courts, the court expressed the view that in those instances where enforcement of fundamental rights through the courts is sought, the courts have a particular responsibility to 'forge new tools and shape 'innovative remedies' to achieve this goal. The court concludes on this aspect of the judgement by noting 'to create a right without a remedy is antithetical to one of the purposes of the charter which surely is to allow courts to fashion remedies when constitutional infringements occur.[144] Similar encouragement to craft appropriate court orders that bring about a workable and practical result can be found in ***In re Kranspoort Community***[145] in the context of section 35 of the Restitution of Land Rights Act.[146]

In ***Mahambehlala v MEC for Welfare, Eastern Cape, and Another***[147] the court in dealing with the failure by the provincial government to process a welfare grant within a reasonable time, the court after citing the decision in ***Fose***[148] with approval concluded that '[i]n the light of this, I am of the view that it is incumbent upon this Court to attempt to fashion what may loosely be referred to as 'constitutional relief' to cater for the fact that the common-law relief to which the applicant would be entitled is insufficient to address the effects of the delay of her social grant for five months and that it is unrealistic to expect her to institute a separate action to claim damages.' A similar approach was taken in ***MEC, Department of Welfare, Eastern Cape v Kate.***[149] In finding that it would be appropriate to award constitutional damages, the court acknowledged that the realization of a substantive right to social justice was dependant on lawfully and procedurally fair administrative action, in determining the appropriateness of constitutional damages, the court looked at the nature and relative importance of the rights in question, whether alternative remedies are available, the consequences to the claimant of the breach. The court then concluded that there was no reason why a breach of a substantive provision of a constitutional right should not be remedied directly.

It is accordingly submitted that the awarding of constitutional damages, in conjunction with other remedies, discussed below, would be appropriate to address the environmental

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[144] ***Fose*** supra note 142 at paragraphs 69 and 19.
[145] 2000 (2) SA 124 (LCC) ('***Kranspoort***') at 107.
[146] Act 22 of 1994
[147] 2002 (1) SA 342 (SE) at 355 ('***Mahmabehlala***').
[148] ***Fose*** supra note 142.
[149] 2006 (4) SA 478 (SCA) at paragraphs 22, 23 and 27.

damage pursuant to water pollution arising as a result of inadequate sanitation in informal settlements.

2.2. Applicability of environmental legislation

Section 24(b) mandated the state to enact legislation aimed at the achievement of the environmental right. Legislation has been promulgated to this end and may accordingly be relevant in the enquiry as to the state's liability for water pollution as a result of in adequate sanitation in informal settlements. The manner in which this legislation interacts and overlaps may also be relevant in determining the state's liability in the present context. The fact that the legislation concerned is relatively fragmented, particularly in the context of pollution control, complicates matters somewhat.[150] The relevance of various statutes in the present context of water pollution in informal settlements will now be examined: the enquiry focuses primarily on the provisions of NEMA and the National Water Act ('NWA')[151] in the context of the research question.

2.2.1. National Environmental Management Act

2.2.1.1. Applicable provisions

NEMA was enacted to give content to section 24 of the Constitution. Section 2 of NEMA sets out the principles that apply to the actions of organs of state that may significantly affect the environment. In particular, section 2(4)(a)(ii) of NEMA provides that pollution and degradation of the environment should be avoided or minimized; section 2(4)(a)(iv) provides that waste should be avoided or where it cannot be altogether avoided, it should be disposed of in a responsible manner; section 2(4)(a)(vii) requires the adoption of a cautious and risk averse approach; section 2(4)(a)(viii) requires that negative impacts on the environment and people's environmental rights be anticipated and prevented, or minimised; section 2(4)(l) requires intergovernmental co-ordination and harmonization of policies, legislation and actions relating to the environment; section 2(4)(o) states that the environment is held in public trust and that the environment is to be protected as the people's common heritage; section 2(4)(p) incorporates the polluter pays principle in that the

[150] Kotze, Louis J 'Revisiting the South African Integrated Pollution Prevention and Control (IPPC) Regime: A Critical Survey of Recent Developments' (2007) 22(1) *SAPR* at 36-38.
[151] Act 36 of 1998

costs of remedying pollution, environmental degradation and consequent adverse health effects and of preventing, controlling or minimizing further pollution, environmental damage or adverse health effects must be paid for by those responsible for harming the environment. It is evident that the above principles find application in the situation of having to establish the state's liability for water pollution as a result of inadequate sanitation in informal settlements. The relevant provisions of NEMA are accordingly analysed below.

The term 'pollution' is defined in section 1 of NEMA as 'any change in the environment (which term in turn includes water) caused by...substances...where that change has an adverse effect on human health or well-being or on the composition...of natural or managed ecosystems....'. It is accordingly submitted that the contamination of river water by untreated sewerage would constitute 'pollution' as defined in NEMA.

Section 28 of NEMA imposes a duty of care on the owner of land, or the person in control of land or the person who has a right to use the property who causes, has caused or may cause significant pollution to the environment to take reasonable measures (as set out in the section) to prevent pollution from occurring, continuing or recurring or where such harm to the environment is authorized by law or cannot reasonably be stopped, to minimize or rectify such pollution to the environment. Furthermore, the section contemplates the issuing of a directive to ensure compliance with the provisions of the section.[152]

In the present context of water pollution from inadequate sanitation in informal settlements, it is evident that insofar as the state may be the owner of land on which the pollution occurs, it would be compelled by virtue of section 28 to take the 'reasonable measures' as contemplated to prevent or minimize the pollution. Section 12 of National Environment Laws Amendment Act ('2009 NEMLA')[153] makes it clear that, notwithstanding the unfortunate decision[154] [155] in ***Bareki NO and Another v Gencor Ltd and Others***[156] section 28 of NEMA applies to historic pollution. It would accordingly not constitute a valid defence in the case of Hout Bay for instance to argue that NEMA is inapplicable as the existence of the informal

[152] Section 28(1)-(4) of NEMA.
[153] Act 14 of 2009 effective from 18 September 2009.
[154] Kidd supra note 27 at 136.
[155] Field, Tracy 'Letting Polluters off the Hook? The Impact of Bareki NO v Gencor Ltd 2006 (1) SA 432 (T) on the reach of s 28 of the National Environmental Management Act 107 of 1998' (2007) (14) *SAJELP* at 122.
[156] 2006(1) SA 432 (T) (***'Bareki'***).

settlement and hence the occurrence of the pollution predates NEMA. Soltau[157] raises the concern that the term 'cannot reasonably be avoided', could create a loophole for polluters. It is evident that the installation of adequate sanitation and sewerage systems is feasible from a technical and engineering perspective, as sanitation is installed in formal residential areas. The only basis on which the state could argue that the pollution could not reasonably be avoided, it is submitted would be to argue resource and capacity constraints to upgrade the sanitation and sewerage systems. The validity of resource and capacity constraints as a defence is discussed below. Furthermore, section 28 only applies if the pollution is 'significant'. In ***Hichange Investments***[158] the court agreed that whilst subjective, and in agreement with Glazewski[159] that the threshold level of significant will 'not be particularly high'. Given the excessively high levels of E.Coli in water samples analysed in Hout Bay for instance, it is submitted that this aspect would be met in the context of the Hout Bay case study. This may however not be the case in the instance of other informal settlements.

The question that arises is what type of liability is contemplated by section 28 of NEMA. Kidd[160] and Soltau[161] share the view that liability in terms of section 28 is strict, i.e. the provisions apply irrespective of fault or even knowledge on the part of the person envisaged in subsection (2). Glazewski[162] states that culpability (*mens rea)* in the form of intent (*dolus)* or negligence (*culpa)* is often difficult to establish especially in the context of environmental offences, and hence the statutes often provide for strict liability, i.e. where fault is not a requirement.

The court in the ***Bareki***[163] decision expresses the view that the liability contemplated in section 28(1) and (2) is strict (i.e. an absence of fault as a requirement to establish liability), and may even be absolute (i.e. inability to raise defences against liability). Field[164] remains unconvinced by the court's reasoning that NEMA may even create absolute liability. Her reasoning is based on the fact that notwithstanding that NEMA does not explicitly create

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[157] Soltau, Friedrich 'The National Environmental Management Act and Liability for Environmental Damage' (1999) 6 *SAJELP* at 44.
[158] ***Hichange*** supra note 54 at 414I-415A.
[159] Glazewski supra note 55.
[160] Kidd, Michael 'Some Thoughts on Statutory Directives Addressing Environmental Damage in South Africa' (2003) 10 *SAJELP* at 204.
[161] Soltau supra note 157 at 48.
[162] Glazewski supra note 55 at 119.
[163] ***Bareki*** supra note 156 at 400.
[164] Field supra note 155 at 115.

defences in favour of the polluter, such defences may be inferred from the manner in which the duty has been framed: in particular, the threshold level of 'significant' pollution and the 'reasonability' of measures undertaken.

The question that arises then, is what one makes of the provisions of section 28(8) where it refers to a person who 'negligently' failed to prevent pollution. In similar vein, section 49 of NEMA requires the exercise or failure to exercise a power or the performance or failure to perform a duty in terms of NEMA to have been 'unlawful, negligent or in bad faith' before liability for such damage ensues. In other words, do these sections imply that liability is not strict, or that the provisions of NEMA are contradictory?

De Villiers J in the ***Bareki***[165] decision explains this apparent anomaly as follows: whilst section 28(8)(d) of NEMA refers to a person who had 'negligently' failed to prevent the pollution causing activity, section 28(8) relates to the recovery of costs incurred by the authorities and does not qualify the nature of the duty or obligation contemplated in section 28(1) of NEMA. In similar vein, section 49 of NEMA 'is not relevant in considering whether a strict liability is created by subsections 28(1) and (2)'. This is because section 49 'does not deal with the imposition of the duty or obligation to take reasonable corrective measures, as do sections 28(1) and (2), but with damage or loss caused by the failure to perform such a duty or obligation and the circumstances in which such damage or loss can be claimed from the person who has failed to perform the duty.' It is submitted that section 49 accordingly regulates when liability for loss or damages may arise in a civil context only.

It is submitted that section 28 is not very clear or consistent as to whether and when negligence is required in order to trigger the provisions of section 28. Whilst it is accepted that strict liability in the case of the creation of a criminal offence will not withstand constitutional muster (this for instance would explain why negligence is a requirement in section 28(14) and (15)), it would seem that there are other areas where the requirement of negligence plays a role: for instance it is only relevant in respect of the person referred to in section 28(8)(d) and not the other categories of persons referred to in section 28(8); the breach of duty in section 28(1) does not require the existence of negligence, whereas the liability for damages in section 49 does require the existence of negligence.

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[165] ***Bareki*** supra note 156 at 399-400.

Applying the provisions of section 28 to the present situation generally, and specifically to the water pollution in Hout Bay, it is submitted that based on the above analysis it is clear that the water pollution results in a breach of the duty of care provisions of section 28(1). Furthermore, given that the water pollution in Hout Bay, and particularly the incidence of human *faeces* in the water has been well documented in the press, it is evident that the City of Cape Town cannot claim that it was unaware of the situation. In our law someone is guilty of negligence is the reasonable person in their position would have acted differently, in our law this would be the case if the unlawful causing of damages was reasonably foreseeable and preventable.[166] A more detail discussion on negligence follows below under the common law.

If it is found that the state acted negligently, then the criminal provisions of section 28(14) and (15) come into play, as would the liability provisions for civil damages and loss incurred contained in section 49 of NEMA. It is submitted that it would be extremely unlikely that a court would find negligence to have been present in context of Hout Bay for instance. Whilst the conduct of the City of Cape Town may have been less than exemplary, it has not flagrantly disregarded its statutory obligations; given the seriousness of the consequences attaching to finding the existence of negligence. A more cautious route may simply be to argue that the water pollution in informal settlements as a result of inadequate sanitation would breach the duty of care provisions contained in section 28(1). The consequences attendant thereto are discussed below.

2.2.1.2. Remedies in National Environmental Management Act ('NEMA')

Section 28(4) of NEMA contemplates the issuing of directives in an attempt to ensure compliance with section 28(1) of NEMA. The term 'directive' is not defined, nor the format of the directive. Non-compliance with a directive is dealt with by means of an application to the High Court to make the directive an order of court, *ad factum praestandum* i.e. and order to do or abstain from doing a particular act or to deliver a thing. Non-compliance with the court order can lead to a contempt of court order and a fine. This however is often easier said than done as is illustrated the Kebble/Stilfontein saga. In ***Minister of Water Affairs and Forestry***

[166] Neethling, J Potgieter, JM and Visser, PJ ' *Law of Delict'* (1990) LexisNexis Butterworths at 111-113.

v Stilfontein Gold Mining Co Ltd and others[167] the court stressed that good corporate governance would include having regard to the environment. Whilst the case dealt with water pollution and the issuing of directives in terms of section 19 of the NWA (discussed below) the difficulties associated with issuing and enforcing the provisions of directive apply equally. The court held that the court had a duty to assist the State by providing suitable mechanisms to ensure that the statutory obligations are properly enforced so that guilty parties are brought to account[168]. Unfortunately on appeal the court in ***Kebble and others v Minister of Water Affairs and Forestry***[169] the court accepted the arguments of the appellants that the directives were unintelligible, incapable of implementation and beyond the control of the appellants.[170] The court accordingly upheld the appeal and found the appellants not to be in contempt of court.

A further stumbling block is to be mindful that the measures contemplated in section 28 of NEMA are primarily intended as an administrative measure and hence is capable of enforcement by the state only. A remedy to this hurdle is contained in section 28(12) of NEMA allowing a person who has requested the Director-General to issue a directive in terms of section 28(4) who has failed to do so, may approach a court to issue an order compelling the department to issue the directive contemplated in section 28(4) of NEMA.

Given that it was concluded above that a potential litigant would be well advised to co-join various organs of state as co-defendants, and given the judicial pronouncements in the ***Uthukela,***[171] ***Nokotyana***[172] and ***Grootboom***[173] decisions referred to in chapter 2.1.5 in the context of co-operative governance and the obligations on organs of state to co-operate and endeavour to resolve disputes at a political level before resorting to legal action, it would seem that to approach the court to compel one organ of state to issue a directive against another organ of state, would be unlikely to be successful. A remedy aimed at ensuring co-operation among the different organs of state would probably find more judicial favour. These are discussed below.

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[167] 2006 (5) SA 333 (W) ('***Stilfontein***').
[168] ***Stilfontein*** supra note 167 at paragraph 353F.
[169] [unreported] [2007] JOL 20659 (SCA) ('***Kebble***').
[170] ***Kebble*** supra note 169 at paragraph 19.
[171] ***Uthukela*** supra note 129.
[172] ***Nokotyana*** supra note 130.
[173] ***Grootboom*** supra note 58, 132.

Section 34 of NEMA deals with criminal proceedings in respect of offences listed in Schedule 3 (which includes section 151(1)(i) and (j) of the NWA (discussed below)) and NEMA itself (pursuant to the promulgation of 2009 NEMLA). It provides for the vicarious liability of employers, and the liability of employees, depending on the exact circumstances. Section 48 of NEMA makes it clear that the state itself cannot be held criminally liable. Section 156 of the NEMA does not define employee and as such it does not give clarity as to whether employees of state are included in the ambit of section 34 of NEMA. The Interpretation Act[174] interestingly defines a person (which is the wording used in section 34 of NEMA) as including any divisional council, municipal council and like authority. Given that the term 'employee' is not defined in NEMA as excluding employees of the state, the term should be interpreted according to its ordinary meaning and hence the provisions of section 34 of NEMA would, it is submitted, apply to employees of the state.

Support for this interpretation can further be found in the State Liability Bill.[175] Whereas the State Liability Act[176] does not deal with the liability of state employees, the State Liability Bill, by way of contrast, expressly contemplates the civil and criminal liability of employees of the state as section 11 deals with civil claims against the state or its employees in their personal capacity and regulates the circumstances and procedures under which the State Attorney will act on behalf of such employee. Section 12 in turn deals with the criminal liability of an employee or former employee of an organ of state, and inter alia, provides that only the State Attorney may act on behalf of the employee unless they have forfeited the cover contemplated in section 11(4). It is accordingly submitted that employees of the state could in principle be held personally liable, either civilly or criminally, in terms of NEMA and section 151(1)(i) and (j) of the NWA. Whether this would happen in practice and whether a court would support this outcome is highly unlikely.

Kidd[177] makes the point in the context of criminal prosecutions that that the courts are in certain instances empowered to enquire into loss or harm suffered by the victim and to order compensation without the injured party having to institute a second (civil) trial aimed at compensation. The provisions of section 34(1) and (2) of NEMA may similarly achieve this,

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[174] Act 33 of 1957.
[175] GG 32289 of 1 June 2009.
[176] 20 of 195.7
[177] Kidd Michael 'Criminal Measures' in Paterson Alexander R and Kotze Louis J '*Environmental Compliance and Enforcement in South Africa*' (2009) Juta and Co Ltd 240-265 at 260.

as it provides that whenever a person is convicted of an offence under Schedule 3 (which includes section 151 of the NWA, then the court may in the same proceedings inquire summarily and without pleadings into the amount of loss or damage so caused. Upon proof of such amount, the court may give a judgement in favour the organ of state or person concerned against the convicted person. These provisions are therefore important insofar as they are aimed at the remediation of environmental damage and may be useful for litigants in the present instance.

2.2.2. National Water Act ('NWA')

It was stated above that section 24(b) of the Constitution mandated the state to enact legislation aimed at the achievement of the environmental right. Legislation, including the NWA, has been promulgated to this end and may accordingly be relevant in the enquiry as to the state's liability for water pollution as a result of in adequate sanitation in informal settlements. The objectives of the new water resource management regulation include social development, economic growth, ecological integrity and equal access.[178] Silberbauer and Schoeman[179] paraphrase the objectives of the NWA as *inter alia*, preventing pollution and degradation of water resources. The NWA contains provisions dealing specifically with water pollution, and created offences in relation to water pollution, which are clearly relevant to the present discussion. These are discussed below.

2.2.2.1. Pollution prevention in National Water Act

Section 1 of NWA defines pollution as 'the direct or indirect alternation of the physical, chemical or biological properties of a water resource so as to make it less fit for any beneficial purpose for which it may reasonable be expected to be used or harmful or potentially harmful to the welfare, health or safety of human beings, ...'. It accordingly submitted that the contamination of water by untreated sewerage would constitute pollution as defined in the NWA. Furthermore, section 2 sets out the purpose of the NWA, which is to ensure that the nation's water resources are *"protected..., in ways which take into account amongst other factors....(h) reducing and preventing pollution and degradation of water*

[178] Perret, S *'Water Policies and Smallholding Irrigation Schemes in South Africa: a History and Institutional Challenges'* Working paper 2002-19 at 9.
[179] Badenhorst, PJ, Pienaar, JM, and Mostert, H (eds) *'Silberberg and Schoeman's The Law of Property'* (2006) LexisNexis Butterworths at 726.

resources". The terms 'pollution', 'protection' and 'water resource' used in section 2 are in turn defined in section 1 of the NWA.

Section 19 of the NWA amplifies the objective of reducing and preventing pollution of water resources as stated in section 2 of the NWA. In particular, section 19 provides for the 'prevention and remediation of effects of water pollution by imposing a duty on landowners or person in control of land in which water pollution threats arise to take all reasonable measures to prevent any such pollution from occurring, continuing or recurring'.[180] It should be noted that section 19(1) only refers to an 'activity which causes, has caused or is likely to cause pollution of a water resource', i.e. no requirement that the pollution should be significant as is the case with NEMA. It is furthermore submitted that given the similarity of the wording contained in section 19 of the NWA to that of section 28 of NEMA, that the NWA be similarly amended to gain clarity as to its retrospective application.

Section 27 of the Constitution guarantees individuals the right of access to sufficient water. One could construct an argument that such water would therefore need to be fit for human consumption; which would presuppose an absence of pollution. Although the term "pollution" as defined in section 1 of the NWA includes the alteration of the properties of a water resource so as to make it harmful or potentially harmful to the welfare, health of safety of human beings, the wording of section 19 of the NWA sadly excludes liability for damages and compensation payable to a human plaintiff.[181]

2.2.2.2. Remedies under National Water Act

Subsection 19(3) enables the catchment management agency ("CMA") to issue a directive where the owner of land or person in control of land had failed to take the requisite measures to prevent pollution.

Where the person to whom the directive is issued, fails to take the measures, subsection 19(4) enables the CMA to take the measures. Kidd,[182] in the context of a similar clause in NEMA that whilst this provision appears worthwhile, it is seldom that environmental

[180] Kidd supra note 27 at 75.
[181] Oosthuizen, Francisca 'The Polluter Pays Principle: Just a Buzz Word of Environmental Policy?' (1998) 5 *SAJELP* at 358.
[182] Kidd supra note 27 at 136.

authorities would have the financial resources to conduct these remedial measures themselves, making the requirement practically impossible. 2009 NEMLA has now amended NEMA to allow for the recovery of costs before undertaking the remedial measures. It is submitted that section 19 of the NWA should be similarly amended. Section 19(8) allows the CMA at the request of any of the persons, and after giving them an opportunity to be heard, apportion the liability in question but the CMA may not relieve any of them from their joint and several liability for the fulfillment of costs. It would therefore appear that the state would be the only plaintiff capable of enforcing the rights contained in section 19 of the NWA. A plaintiff would be able to approach the court for an order compelling the relevant authority to issue the directive contemplated in section 19.

Section 151(d) and (i) render it an offence to fail to comply with a directive issued in terms of section 19(3) and to unlawfully, intentionally or negligently commit an act or omission which pollutes or is likely to pollute a water resource. Section 34 of NEMA (including 2009 NEMLA) now makes non-compliance with section 151 of NWA a criminal offence.

In **Harmony *Gold Mining Co Ltd v Regional Director: Free State, Department of Water Affairs and Forestry***[183] a directive issued in terms of section 19(3) of the NWA was interpreted to include the obligation to take measures on land belonging to another. In arriving at this conclusion, the court interpreted the provisions of section 19 of the NWA with reference to the objectives of the NWA and the provisions of section 24 of the Constitution. In addition, it referred to the provisions contained in section 1(3) of the NWA, requiring the adoption of a reasonable interpretation which is consistent with the purpose of the NWA, and that such interpretation is to be preferred over any alternative interpretation that is inconsistent with the purpose of the legislation.[184] The court held that the wording contained in section 19(1) and (2) of the NWA and in particular the 'reasonable measures' contained therein intended to lay down a flexible test depending on the circumstances of each case. It could not be interpreted so as to exclude the responsibility of taking measures on another's land and concluded that on a proper construction of section 19(1) there is no territorial limitation in that section. In addition, it held that the 'constitutional and statutory anti-pollution

[183] [2006] SCA 65 RSA ('***Harmony***').
[184] ***Harmony*** supra note 183 at paragraph 22.

objectives would be obstructed if the measures required of the persons referred to in section 19(1) were limited to measures on the land mentioned in that subsection'.[185]

Section 19 of NWA does not deal with liability for damages and compensation payable to human plaintiffs; nor does it explicitly state the form of fault to constitute liability. Oosthuizen suggests[186] that whilst section 19(1) provides for vicarious liability as a form of strict liability, the section rather suggests negligence to establish liability according to the polluter pays principle. This is due to the fact that section 19(1)(b) and 19(2)(a)-(f) resemble the reasonable foreseeability of damages and the reasonable preventative measures to be taken accordingly, as entailed in the reasonable person test to establish negligence.[187]

Section 151(1) of the NWA prohibits anyone from 'unlawfully and intentionally or negligently commit(ing) any act or omission which pollutes or is likely to pollute a water resource' and section 151(2) renders it an offence. Section 152 and 153 then provide for the award of damages or the undertaking or remedial measures. Section 156 provides that the NWA binds all organs of state and does not, unlike section 48 of NEMA, exclude criminal liability of the state. Furthermore, section 157 provides that neither the state nor any other person can be held liable for any damages of loss from the exercise of any power or the performance of any duty or failure to exercise any power of perform any duty unless such act or omission is accompanied by unlawfulness, negligence of bad faith. As noted above, pursuant to 2009 NEMLA amendments, section 34 of NEMA read with Schedule 3 now makes non-compliance with section 151 of NWA a criminal offence.

The comments above with regard to the issuing of section 28 directives by one organ of state against another and the ensuing criminal liability of state employees apply likewise to the NWA.

2.2.3. Other statutes

Statutes such as The Municipal Systems Act, The National Housing Act[188], The Development Facilitation Act[189], The Less Formal Township Establishment Act[190] regulate

[185] ***Harmony*** supra note 183 at paragraph 33.
[186] Oosthuizen supra note 181 at 359.
[187] As formulated in ***Kruger v Coetzee*** 1966 2 SA 428 (A).
[188] Act 107 of 1997.

aspects relating to informal settlements. These statutes may contain provisions of relevance particular to sanitation in informal settlements. It is submitted that a detail discussion of these statutes fall outside the scope of this paper; suffice to say that there appears to be nothing in those statutes that could remotely be construed as condoning the absence of adequate sanitation in informal settlements in certain circumstances. As such organs of state would not be able to rely on the provisions of these statutes as a valid defence for the absence of adequate sanitation in informal settlements.

The newly promulgated National Environmental Management Waste Act[191] contains provisions in section 35-41 dealing with contaminated land. The date of commencement of these sections is to be determined by the Minister (being the Minister of Water and Environmental Affairs). 'Contaminated' is defined in section 1 as 'the presence in or under any land.....of a substance or micro-organism above the concentration that is normally present in or under that land, which substance or microcosm directly or indirectly affects or may affect the quality of soil or the environment adversely'. The Act makes it clear that the provisions of the act applies to historic contamination, it may have originated on land other than that which need to be remediated. It provides that the Minister may identify, after consultation with organs of state, land on which high risk activities are being undertaken or land in respect of which the Minister on reasonable grounds believe may be contaminated, as investigation areas. Once land has been identified as an investigation area, the Minister, may require the land to be assessed, after which the Minister or the MEC may decide that the area is contaminated and order that it be declared a remediation site, and may make such remediation order is it is necessary to neutralize that risk.

In theory it would accordingly appear, that should the Minister fail to act in accordance with the abovementioned sections, an aggrieved party may approach the court for an order directing the Minister to act as contemplated in sections 35-41. However, given the comments by the judiciary as to how the concept of co-operative governance should be applied and interpreted in practice, it is unlikely that these provisions of the Waste Act, intending as administrative provisions, would be of much use to private litigants against the state.

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[189] Act 67 of 1995.
[190] Act 113 of 1991.
[191] Act 59 of 2008.

2.3. Application of common law

The applicable common law provisions will now be analysed to determine to what extent these may be used in conjunction with or as an alternative to the statutory remedies discussed above.

Glazewski[192] points out that the principles of pollution control and waste management have their origin in Roman law and accordingly most of the traditional branches of law should be considered when applying the common law principles to pollution activities. These include criminal law, the law of delict, the law of neighbours (law of nuisance) and administrative law.

As far back as the decision in ***King v Dykes***[193] our courts acknowledged that ownership of property is not an unlimited right; accordingly an owner of land could not use his land in a manner that would prejudice his neigbours, and particularly in the context of the prevention of pollution to a neighbour's property the court held that this would constitute a 'more civilized and enlightened attitude' towards property ownership.

2.3.1. Availability of common law remedies

The question that first needs to be asked is given that there are anti-pollution measures in both NEMA and NWA as illustrated above; does this exclude the availability of common law remedies? In ***Madrassa Anjuman Islamia v Johannesburg Municipality***[194] the court answered this question in the affirmative and held that where specific remedies such as criminal sanctions or administrative measures are provided for in legislation it is presumed to have intended to exclude other remedies, except an interdict. A similar view was held in ***Hall and Another v Edward Snell and Co Ltd.***[195]

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[192] Glazewski supra note 55 at 533.
[193] 1971 (3) SA 540 (RA) at 545H.
[194] 1917 AD 718 ('***Madrassa***') at 722-723.
[195] 1940 NPD 314.

The court had a different view in ***Prinsloo v Luipaardsvlei Estates and GM Co Ltd***[196] and ruled that the common law remedies remained available. Here the defendant mining company had polluted water and argued that the mining legislation applicable at the time by implication would result in lower riparian owners' common law rights being taken away. The court however held that the exercise of a statutory right to mine cannot be used to infer that the common law duty of care to prevent pollution prevention and damages payable in the event of pollution had been abrogated. A similar approach was followed in ***Rainbow Chicken Farm (Pty) Ltd v Mediterranean Woollen Mills (Pty) Ltd***[197] where the court, without referring to ***Madrassa,*** applied the provisions of section 21 of the previous Water Act[198] which imposes obligations to purify and dispose of industrial water and effluents, held that 'the producer of the effluent, quite apart from the statutory duties imposed upon him by secs. 21 (1) and (2) owes a common law duty of care towards others. Sec. 21 (3) relieves him of the statutory obligations imposed upon him by sub-secs. (1) and (2) but it goes no further than that.'

Similarly in ***Lascon Properties (Pty) Limited v Wadeville Investment Company (Pty) Limited and another***[199] the court ignored the rule in ***Madrassa.*** The case concerned an action for damages arising from the release of contaminated water from the defendant's premises, and whether the legislature intended to give a right of action arising out of the breach of statute outside of the common law. Whilst the answer would lie in the construction of the particular statute, the court argued that the regulations were *prima facie* enacted for the benefit of owners of land which might be polluted as a result of the actions of a mining company. Accordingly the court held that the legislature would not have imposed an obligation to prevent the escape of noxious water without intending persons harmed thereby to be entitled to be compensated by the person permitting the water to escape. 'For, if it were not so, the statute would be but a pious aspiration'.

Soltau[200] is of the view that given the special nature of the remedies contemplated in section 28 of NEMA, they can be interpreted as an intention by the legislature to exclude common-law remedies. He is of the view that the wording in section 28(12) of NEMA empowering any

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[196] 1933 (W) 6.
[197] 1963 (1) SA 201 (N) (***'Rainbow Chicken Farm'***) at 205.
[198] Act 54 of 1956.
[199] 1997 3 All SA 433 (W) (***'Lascon Properties'***) at paragraph 432 and 438.
[200] Soltau supra note 157 at 50.

person to approach the court for an order directing the competent authority to take any of the steps listed in subsection 4 further support this view.

In ***Johannesburg City Council v Knoetze and Sons***[201] the court in dealing with the recovery of registration, licencing fees and penalties in terms of a road traffic ordinance, held that such fees are not recoverable by means of a civil remedy, but however held that whether the authorities are entitled to an interdict in addition to the statutory remedies, depends on whether or not the ordinance expressly or by necessary implication excludes the remedy of an interdict to enforce the observance of the provisions of the ordinance and held that the remedy of an interdict was available over and above the statutory remedies. This decision was cited with approval in ***Woodcarb***[202] as applying 'with equal and absolute force to the provisions of the Act' (i.e. APPA) and that the principle that the Act is exclusive as to what may be done to enforce its provisions does not arise.

In the context of the provisions of APPA the court in ***Minister of Health v Drums and Pails Reconditioning CC T/A Village Drums and Pails***[203] held that the purpose of the legislation is to 'control' the installation of Scheduled processes throughout the Republic. The court could accordingly find no basis for a contention that the applicant did not need the remedy of an injunction to enable her to control these processes effectively, thereby discharging her duties under the Act. Furthermore the court held that the fact that alternative remedies were available such as the penal provisions of the Act, is no bar to the availability of an interdict. In ***Hichange***[204] the court cited the use of the interdict in enforcing the provisions of APPA with apparent approval by referring to the decisions in ***Woodcarb***[205] and ***Village Drums***[206] but presumed that no reliance was placed on these decisions in the present instance presumably due to the absence of the requisite factual allegations. The availability of the interdict in ensuring compliance with the provisions of APPA was similarly recognized in ***Tergniet***[207] where the applicants sought an order declaring the operations of the first respondent as unlawful as not authorized in terms of APPA and sought an interdict refraining

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[201] 1969 (2) SA 148 (W) at 154.
[202] ***Woodcarb*** supra note 96.
[203] ***Village Drums*** supra note 99 at 877E-E/F read with 877F/G-G.
[204] ***Hichange*** supra note 54.
[205] ***Woodcarb*** supra note 96.
[206] ***Village Drums*** supra note 99.
[207] ***Tergniet*** supra note 107 at paragraph 12

them from operating certain processes unless and until the requisite authorizations in terms of APPA are issued, which order was granted.

More recently in ***Mostert v The State***[208] the court held that 'the mere fact that conduct might constitute an element of both a common law offence and a statutory offence is not in itself any reason to find that the legislature intended only the statutory offence to be capable of prosecution'. In fact the court holds that where there is an overlap between a statutory and common law offence, the penalty prescribed by the statutory offence may be a useful guide in determining an appropriate sentence for the common law offence. The court further commented that the legislature could bar the prosecution of certain common law offences, but support for this view would need to be found in the legislature itself.[209] It should however be borne in mind that this case dealt with the common law crime of theft in conjunction with offences in terms of the NWA. It is submitted that the case cannot therefore be interpreted as supporting the contention that delictual damages for instance continue to co-exist alongside legislation especially when viewed in the context of the hesitance of the courts in awarding damages against the state for pure economic loss.

It may be argued that section 28 is an administrative remedy and falls per definition outside of the ambit of damage to property (which includes the environment) and as such it is irrelevant to debate whether section 28 excludes the common law or not. It should however be borne in mind that section 49 of NEMA does contemplate the awarding of damages and therefore it is submitted that a breach of section 28, whilst primarily intended as an administrative remedy, may result in damages being paid as contemplated in section 49. Accordingly whether section 28 excludes the common law remedies or not remains a valid question. It is accordingly submitted that the view expressed by Soltau above, i.e. that section 28 of NEMA is worded in a manner that suggests an intention by the legislature to exclude common law remedies is incorrect given the case law referred to above. Furthermore, the mandate afforded to the courts to develop the common law to give effect to the spirit, purport and objects of the Bill of Rights in terms of section 39 of the Constitution, coupled with the importance of the rights in the Bill of Rights, mitigate against an interpretation to exclude the common law in the absence of a very clear intention expressed

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[208] (338/2009) [2009] ZASCA 171 (1 December 2009) ('***Mostert***').
[209] ***Mostert*** supra note 208 at paragraph 19-20.

by the legislature. Kidd correctly, it is submitted, states that it may be preferable to provide expressly in legislation whether common law damages claims are still available.[210]

The various common law remedies that may find application to the present instance will now be considered.

2.3.2. The law of delict

The common law of delict originates in the *action legis Aquilia* of Roman law and is very relevant to pollution law generally.[211] The purpose of the imposition of liability (in the form of an award for damages) is primarily to compensate the plaintiff in order to restore his patrimony and as far possible to place him in the position he or she would have been had the delict not been committed.[212] The application of delictual liability in the context of water pollution as a result of inadequate sanitation in informal settlements is discussed below. An actionable delict comprises five elements which are discussed below in the context of pollution law.

2.3.2.1. An act or omission

The first requirement in order to establish delictual liability is whether an act or omission has occurred. Given that the organs of state are being charged with a failure to provide and install adequate sanitation and sewerage, the enquiry is therefore whether such a failure to act constitutes an omission as defined for the purposes of establishing delictual liability.

Prior to the decision in ***Minister van Polisie v Ewels***[213], and other than a minority decision in ***Silva's Fishing Corporation (Pty) Ltd v Maweza***[214] the position in our law was that a person was under no legal duty to prevent harm to another. The court in ***Ewels*** bravely (given the political situation at the time and given that the case dealt with assault by off-duty police officers) 'set the stage' by establishing delictual liability for failure to act as part of our law. The court formulated the question as to whether the duty to protect in a given situation translates into a legal duty as opposed to merely eliciting the moral indignation of society.

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[210] Kidd 'Alternatives to the Criminal Sanction' (2002) 9 *SAJELP* at 47.
[211] Glazewski supra note 55 at 536.
[212] Summers R '*Common Law Remedies for Environmental Protection*' in Paterson, Alexander and Kotze, Louis J '*Environmental Compliance and Enforcement in South Africa*' (2009) Juta and Co Ltd 339-369 at 357.
[213] 1975 (3) SA 590 (A) ('***Ewels***').
[214] 1957 (2) SA 256 (A) cited in ***Ewels***.

In ***Minister of Law and Order v Kadir***[215], the court was asked to consider the liability of the Police pursuant to an alleged failure to carry out a legal duty in the post-Constitutional era. The court cites *inter alia* the ***Ewels***[216] decision with approval in that the accepted norm for determining the wrongfulness of omissions in legal actions is whether a legal duty to act existed, which entails policy considerations. Policy considerations in turn reflect the unspoken wishes of the people and shape and refashion the common law.[217] Van Aswegen[218] is more circumspect as to policy considerations amending the law: this would only happen where 'obvious dissonance between the law as applied hitherto and present circumstances and attitudes' exist.

In ***Carmichele***[219] the Constitutional Court acknowledged that the common law, especially delict, often required development, and that in so doing, the provisions of section 39(2) of the Constitution require it to have regard to the spirit, purport and objects of the Bill of Rights.[220] Furthermore, it was stressed that this role of the court is not purely discretionary.[221] In determining whether there was a legal duty on the police offers to act, the court cited with approval the opinion of Hefer JA in ***Kadir***[222] and held that this determination would entail striking a balance between the interests of the parties and the conflicting interests of the community. This according to the Constitutional Court essentially entailed a proportionality exercise which exercise must now be conducted having regard to the spirit, purport and objects of the Bill of Rights.[223] The court's undaunted approach towards the 'chilling effect of delictual liability' on the exercise of public duties is commendable. The court expresses the view that the proportionality exercise coupled with the requirements of foreseeability and proximity would sufficiently address these fears. Blanket public interest immunity would furthermore be in conflict with the constitutional values.[224] Some writers have referred to this case as having 'opened the door through which

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[215] 1995 (1) SA 303 (A) E 1995 (1) SA 303 ('***Kadir***').
[216] ***Ewels*** supra note 213.
[217] Corbett MM 'Aspects of the Role of Policy in the Evolution of our Common law' (1987) 104 *SALJ* 52 at 66-68.
[218] Van Aswegen, Annel 'Policy Considerations in the Law of Delict' (1993) 56 *THRHR* at 186.
[219] ***Carmichele*** supra note 127.
[220] ***Carmichele*** supra note 127 at paragraph 35.
[221] ***Carmichele*** supra note 127 at paragraph 39.
[222] ***Kadir*** supra note 215.
[223] ***Kadir*** supra note 215 at paragraph 43.
[224] ***Kadir*** supra note 215 at paragraph 49.

the law of bureaucratic negligence walked into the theatre of public adjudication in South Africa.[225]

In ***Minister of Safety and Security v Van Duivenboden***[226] and ***Van Eeden v Minister of Safety and Security (Women's Legal Centre Trust, as Amicus Curiae***[227] the court acknowledged a change that had occurred in the post-democratic era, and that the positive constitutional duty exists to protect rights contained in the Bill of Rights.[228] The views expressed in these judgements that caution against fearing a 'spectre of limitless liability...should not be unduly exaggerated' as the requirements to 'establish negligence and a legally causative link provide considerable practical scope for harnessing liability within acceptable limits.[229]

The above analysis indicates that the courts have boldly embraced their constitutional duties and have not hesitated to find actions or omissions of the Police culpable and awarded delictual damages where appropriate in the context of first generation or civil and political rights. The question that accordingly arises, is whether the same boldness will be forthcoming from the courts in the context of the liability of the state for failing to take the requisite action to prevent water pollution arising from inadequate sanitation in informal settlements?

Gabru[230] points out the distinction between the enforcement of civil and political, so called first generation rights and second generation rights dealing with socio-economic issues. Mbazira[231] similarly refer to this distinction but is unconvinced that a distinction should be drawn for instance on the basis of vagueness as to the content of the right, and argues that the courts seem to 'rush' in certain instances or alternatively merely accept that no minimum core content exists and caution as to capacity and resource constraints without requiring the state to argue and prove lack of resources in a specific context. It is submitted that this interpretation cannot be sustained in the plain wording of section 24 when compared with

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[225] Okpaluba, Chuks 'The Law of Bureaucratic Negligence in South Africa: A Commonwealth Perspective' (2006) *Acta Juridica* at 144.
[226] 2002 (6) SA 431 (SCA) ('***Van Duivenboden***').
[227] 2003 (1) SA 389 (SCA) ('***Van Eeden***').
[228] ***Van Duivenboden*** supra note 226 at 447.
[229] ***Van Duivenboden*** supra note 226 at 445-447.
[230] Gabru supra note 65 at 3-5.
[231] Mbazira, Christopher '*Litigating Socio-Economic Rights in South Africa*' (2009) Pretoria University Law Press at 30, 66 and 100-102.

the wording contained in section 26 and 27 of the Constitution, where the 'availability of resources' and the 'progressive realisation' of the rights are clearly contemplated. It is accordingly submitted that the failure to act in the present context should constitute an act or omission as contemplated in the delictual realm.

2.3.2.2. Wrongfulness

The state will not be held delictually liable for water pollution in informal settlements as a result of inadequate sanitation unless their actions, or in the present instance, their omissions, are regarded as wrongful. The concept of wrongfulness and what it entails accordingly need to be analysed.

The Supreme Court of appeal reaffirmed the position in our law in ***Gouda Boerderye BK v Transnet***[232] that negligent conduct giving rise to loss, unless accompanied by wrongfulness, is not actionable and will not result in liability in terms of the A*quilian* action. The term wrongfulness depends on the legal convictions of the community or *boni mores;* conduct will be regarded as wrongful if public policy considerations demand in the particular circumstances that the plaintiff should be compensated.[233] This test is however fluid and inexact. In the environmental context, matters are complicated further due to the fact that in the case of pollution, the generation of pollutants through industrial activity has not traditionally been regarded as wrongful.

The decision in ***Verstappen***[234] illustrates that an act or omission that violates a statutory provision and causes the plaintiff damage is *prima facie* unlawful. The question that then arises is whether the converse holds true, the defence of statutory authority: where the act complained of is generated by or as a result of a statutorily authorized activity, does it exclude delictual liability due to the requirement of wrongfulness not being met?

In ***Johannesburg Municipality v African Realty Trust***[235] the court held that where the exercise of statutory powers is alleged to have resulted in injury to another, the enquiry must

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[232] 2005 (5) SA 490 (SCA) ('***Gouda Boerderye***') at paragraph 13.
[233] ***Telematrix (Pty) Ltd T/A Matrix Vehicle Tracking v Advertising Standards Authority*** SA 2006 (1) SA 461 (SCA) at 28.
[234] ***Verstappen*** supra note 48.
[235] 1927 AD 163.

always be what the legislature intended. In situations where the statutory provisions are express there is no difficulty and where it is directory, and the powers are exercised in the authorized manner, no liability exists. Where the statutory powers are permissive it needs to be show that the interference with private rights is justified.

In ***Herrington v Johannesburg Municipality***[236] it was held, in the context of an application for an interdict restraining the municipality from operating sewerage works on a neighbouring property, that in the absence of an express provision, a statutory power may deprive third person of their rights of action if the authorized work is defined both in regard to locality and character. This may also be the case if the performance is compelled due to an express legislative command of if a public duty to act immediately requires it.

In ***Local Transitional Council of Delmas and another v Boshoff***[237] the court had to consider whether a local authority would be liable for delictual damages pursuant to the establishment of an informal settlement adjacent to property belonging to the plaintiff. Amongst other, both underground water and river water flowing through the farm was contaminated by untreated sewage.[238] In particular, the court was asked to consider whether the defendants were under a legal duty to take reasonable steps to protect the plaintiff from harm.

The defendants argued that the law imposed no duty on them as the establishment of the informal settlement was authorized by the provisions of the Less Formal Township Establishment Act ('LFTA');[239] therefore neither the establishment of the township itself nor the consequences of such establishment could be regarded as wrongful. Moreover, the defendants contended, the law could not impose a duty on them to take preventative methods for which they had no funds.[240] The court cited the decision in ***Diepsloot Residents and Landowners Association and Others v Administrator, Transvaal, and Others***[241] with approval[242] where the court held that the power to establish a township conferred on a public authority does not that mean that it will be absolved from liability for

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[236] 1909 TH 179.
[237] [2005] 4 All SA 175 (SCA) ('***Delmas v Boshoff***').
[238] ***Delmas v Boshoff*** supra note 237 at paragraph 6.
[239] Act 113 of 1991.
[240] ***Delmas v Boshoff*** supra note 237 at paragraph 16.
[241] 1993 (3) SA 49 (T) ('***Diepsloot***') at paragraph 351 E-G.
[242] ***Delmas v Boshoff*** supra note 237 at paragraph 26.

failing to take reasonable practical measures that would lessen the harm that will be caused by the exercise of that power. In addition, the court reiterated that wrongfulness and negligence (as a form of fault) constitute separate elements of delictual liability.

How do we apply the principles established by the above case law to the present enquiry of delictual liability for water pollution arising from inadequate sanitation in informal settlements? Summers[243] suggests that notwithstanding the paucity of South African jurisprudence in relation to delictual liability for environmental damage, the importance of the environmental considerations mandated inter alia by section 24 of the Constitution is indicative of the public and legal policy considerations that will be relevant to an enquiry into wrongfulness. Glazewski[244] confirms this by stating that the reference to reasonable measures to prevent pollution in section 24 of the Constitution suggests that a lesser threshold of pollution is to be tolerated than was the case in the past. Furthermore the reference to an environment that is not detrimental to health or well being intimates that pollution is contrary to the legal convictions of the community and hence wrongful.[245] It is accordingly submitted that this requirement of delict, namely wrongfulness, will be met in the present enquiry.

2.3.2.3. Fault

The next requirement to establish delictual liability as a result of water pollution in informal settlements pursuant to inadequate sanitation, is the requirement that the organ of state must be guilty of fault in the form of intent (*dolus)* or negligence *(culpa)*. In the environmental pollution context, as is the case at present, the question typically revolves around what constitutes negligence as opposed to intent and our discussion is accordingly confined to negligence in establishing fault. The *locus classicus* in this regard is the decision in ***Kruger v Coetzee***[246] where the test to determine negligence is to refer to the standard expected by the reasonable person or *diligens paterfamilias.* In particular the question is whether the reasonable person would have foreseen the harm, and would that person have taken steps

[243] Summers supra note 212 at 359.
[244] Glazewski supra note 55 at 537.
[245] Glazewski cites the decisions in ***Woodcarb*** and ***Hichange Investments*** in support of the contention that pollution is now contrary to the legal convictions of the community and hence wrongful.
[246] 1966 (2) SA 428 (A).

to avoid the harm. Glazewski[247] illustrates the problems with regard to the foreseeability of damage in the environmental context and refers to the decision in ***Cambridge Water Co v Eastern Leather Plc.***[248] It is further not settled law whether conduct contrary to a statutory provision is *per se* negligent, but has been suggested that it would be one of the factors to be taken into account in the determination of negligence.

In ***Lascon Properties***[249] the court held that, in the case of a breach of a statutory duty (regulations issued in terms of the Mines and Works Act[250]) it may not be necessary for the plaintiff to allege fault on the part of the defendant. Kidd[251] is of the view that the decision is incorrect as the breach of statutory duty determines whether there has been wrongfulness, it does not have an impact on the normal *Aquilian* requirement of fault. He recommends that it would be preferable to provide for strict liability in the case of breach of environmental statutes.[252]

In establishing fault in the present context and particularly in the instance of Hout Bay, it would greatly assist the case for the litigants should they be able to obtain information such as copies of minutes, internal reports, and water samples taken by or in the possession of the City of Cape Town as a pattern of being aware of the pollution situation coupled with a failure to action it. Furthermore, these documents would be useful to establish the requisite link between the foreseeability of the harm and a reasonable person that would have taken steps to prevent or minimize that harm. In addition, the analysis above with regard to statutes applicable to informal settlements concluded that there is nothing in those statutes to suggest a condonation of the absence of adequate sanitation may be statutorily authorized. It is submitted that these factors may well pose an insurmountable challenge to the municipality in rebutting the challenge of negligence, subject however, to what is said below in respect of raising a defence of resource and capacity constraints.

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[247] Glazewski supra note 55 at 540-541.
[248] 1994 2 WLR 53 HL (E).
[249] ***Lascon Properties*** supra note 199.
[250] Act 27 of 1956.
[251] Kidd, Michael 'Particular Focal Areas: Water, Climate Change, Soil, Mountains and Energy' (2006) 13 *SAJELP* at 47-48.
[252] Kidd points out that this may impact on the burden of proof being shifted with a resultant question as to the constitutionality thereof. That aspect however falls outside the scope of this paper.

2.3.2.4. Causation

The next step is the establishment of causation between the act or omission of the defendant organ of state and the harm. In this regard, both factual and legal causation are required. Glazewski[253] cautions that factual causation may be difficult to establish in the environmental context due to, inter alia, an insufficient understanding of the scientific causes; in any event expert evidence may often be decisive in determining factual causation. A multiplicity of pollution sources may also complicate matters in that it may be difficult if not impossible to determine which polluter was responsible for the harm caused. Summers[254] and Soltau[255] echo the concerns of Glazewski by stating that proving causation and harm, can be 'difficult, time-consuming and expensive' and may effectively preclude the use of the law of delict as an effective tool in establishing environmental liability.

The fact that one act may result in a multiplicity of consequences, the courts have formulated the concept of legal causation to limit the defendant's liability as was illustrated in ***Natal Fresh Produce Growers.***[256] In this case the applicant failed to obtain an interdict prohibiting the manufacture and distribution of herbicides as the requisite causal link between the manufacture of the herbicides and their alleged harmful effects had not been established.

Some of the difficulties surrounding causation may be illustrated with reference to the water pollution in the Hout Bay scenario. It appears that the ratepayer group wishing to take local government to task about the water pollution of the Disa River is intending to seek the relief that residents of the Dontse Yahke be relocated as it is felt that it is overcrowding in Dontse Yahke by means of 'shack farming' that is causing the problem. This decision to seek the relief in that only a section of residents in the informal area be relocated (be it temporary or permanently) was deemed necessary in the interests of political expediency. Similar situations may well arise in the context of other informal settlements. Whilst this may solve certain political issues and facilitate cooperation among residents in the formal and informal sectors of the community, it does not bode well for issues surrounding causation. The concern that accordingly arises, is that it would be difficult if not near impossible to prove in

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[253] Glazewski supra note 55 at 544-546.
[254] Summers supra note 212 at 361.
[255] Soltau supra note 157 at 39.
[256] ***Natal Fresh Produce Growers*** supra note 90.

those particular circumstances that the pollution of the Disa River emanates from Dontse Yahke. This is due to a number of factors: the fact that the Disa River is being polluted by a multiplicity of sources (including Dontse Yahke, Imizamu Yethu, agricultural activities higher up the Orangekloof (the catchment area of the Disa River), both the World of Birds and Domestic Animal Rescue Group discharge animal faeces into the Disa River. Matters are further complicated by the fact that the area surrounding Dontse Yahke and Imizamu Yethu comprises a reasonably steep slope and this together with the positioning of existing storm water drains that overflow from time to time, make it extremely difficult to pin point the originating source of the pollution. In addition, the municipality had established detention ponds in an attempt to deal with the water pollution. These overflow from time to time, resulting in an alteration of the natural flow of polluted water, making it difficult if not impossible to pin point the originating cause of the pollution. Furthermore, very limited historical data relating to levels of pollution is available. In particular, some of the data was gathered by local residents and it may well be that a court of law may question the authenticity of the evidence in view of the lack of independence and objectivity of the persons gathering the data. The limited extent of data makes it difficult if not impossible to prove that the pollution of the water of the Disa River increased proportionally as Dontse Yahke/Imizamu Yethu expanded. Furthermore, some of the historical specimens that were obtained were not obtained in anticipation of litigation and concerns have been raised as to whether all procedural safeguards can be said to have been met: for instance it has not been established beyond doubt that some of the contamination found in the specimens could have occurred post removal from the Disa River and before being tested. A further complicating factor is that the fact that the sewerage system of the formal built-up areas of Hout Bay is not functioning totally properly as it is showing signs of ageing and was designed for a smaller formal population. As such the possibility that some of the pollution of the water in Hout Bay emanates from the formal residential area, and not the informal settlements, cannot be excluded.

The above illustrates that the establishment of causation as a prerequisite for the establishment of delictual liability may be problematic. In the example of Hout Bay, some consensus has been reached between the City of Cape Town and the residents' association that a solution to the water pollution problems is urgent. In this regard, the possibility has been mooted that the originating cause of the pollution is not in dispute. Parties may accordingly wish to avail themselves of the possibility of perhaps reaching agreement as to

the cause of pollution during the pre-trial phase of litigation in order to avoid costly and lengthy debates on a contentious issue such as causation.

2.3.2.5. Patrimonial loss

The general rule is that delictual remedies are available to compensate a victim for patrimonial or pecuniary loss. In the environmental context, and particularly the use of the *Aquilian action* in the present instance of water pollution as a result of inadequate sewerage and sanitation in informal settlements, a number of problems arise.

Firstly, the problems generally with regard to causation in the environmental context were discussed above. The matter of causation re-emerges in the context of proving patrimonial loss in an *Aquilian* action in that the plaintiff would need to show the existence of a causal link between the pollution or environmental degradation and the patrimonial loss suffered either to his or her specific property or to the environment generally. To prove a reduction in value of a specific property which is purely attributable to environmental pollution, as opposed to, say, the general downturn in the economy, may be near impossible. Furthermore, Soltau[257] raises the concern as to the claiming of patrimonial loss in the context of the environment generally as difficult as it is inherently difficult to place an economic value on the environment. Summers points out that our law does not currently recognize liability for environmental damage where no personal or proprietary interests have been harmed. The biggest obstacle to the Aquilian action in the context of environmental harm is the requirement that the damage must be quantifiable in terms of patrimonial loss; accordingly they are of the view that the Aquilian action is 'inadequate' as a mechanism for determining compensation for damage to an environment that is un-owned.[258]

Another complicating factor cited by both Summers[259] and Soltau[260] in the present context, is that the damages awarded in a delictual action cannot exceed the value of the property. Given that the costs of remediation with reference to which the damages claim may be

[257] Soltau supra note 157 at 36-37.
[258] Summers supra note 212 at 363.
[259] Summers supra note 212 at 364.
[260] Soltau supra note 157 at 37.

calculated may well exceed the value of the property, it is evident that awarding of delictual damages may be inappropriate and ineffectual in the context of environmental harm.

Soltau[261] raises a further concern as to the inappropriateness of a delictual damages claim as a remedy in the context of environmental damage, as there is no guarantee that the plaintiff recovering damages for environmental harm will actually expend that money for the benefit of the environment.

The above conundrum with regard to the quantification of damages and the absence of an assurance that the damages will be spent on environmental rehabilitation may, it is submitted, be addressed should the courts embrace their constitutional mandate contained in section 39 and 172(1)(b) of the Constitution. These sections empower the courts to develop the common law to promote the spirit, purport and objects of the Bill of Rights and to make any order that is 'just and equitable'. It is submitted that this constitutional mandate would be sufficiently wide to afford the courts the discretion to for instance apply the substitute the requirement of patrimonial loss in the context of environmental damage with the rehabilitation costs required to restore or protect the environment. Secondly the mandate in section 172(1)(b) read with the discussion on the structural interdict discussed below, it is submitted would allow a court to issue a court order so as to ensure and monitor that the damages awarded will in fact be spent on environmental rehabilitation.

The above submission is certainly bold and perhaps overly wishful and this shift in judicial thinking will certainly not happen overnight, if at all. However, even if one assumes for the moment that this aspect may be able to be resolved, then the reluctance by the courts to extend delictual liability for pure economic loss, and more particularly where it involves holding the state liable, may well be the proverbial final nail in the coffin.

Soltau[262] is bold in his assertion that pure economic loss is ordinarily not recoverable in terms of the law of delict. Some encouraging precedent has emerged from our case law in this regard; it would appear that the awarding of damages for pure economic loss *per se* is acknowledged by the courts, however, this seems easier said than done when the damages claim needs to be funded out of state coffers. This is discussed below.

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[261] Soltau supra note 157 at 38.
[262] Soltau supra note 157 at 37.

The decisions in ***Administrateur, Natal v Trust Bank van Afrika Bpk,***[263] followed by ***Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd Lillicrap,***[264] ***Cape Town Municipality v Bakkerud,***[265] ***Olitzki Property Holdings v State Tender Board and Another,***[266] ***Steenkamp NO v Provincial Tender Board, Eastern Cape***[267] and ***Fair Cape Property Developers (Pty) Ltd v Premier, Western Cape***[268] whilst dealing with issues ranging from personal injury to loss of profits all express a very determined reluctance to hold the state delictually liable for damages due to the risk of 'floodgates of litigation' and the resultant fiscal strain this may place on the state.

In ***Delmas v Boshoff***[269] a delictual action was instituted against the local authority pursuant to the establishment of an informal settlement adjacent to property belonging to the plaintiff. In particular, the court was asked to consider whether the defendants were under a legal duty to take reasonable steps to protect the plaintiff from harm. The defendants argued that the law imposed no duty on them as the establishment of the township was authorized by the provisions of the LFTA. The court rejected this argument and held that the legal convictions of the community would have required the defendants to conduct an impact study as to the impact of the establishment of the informal settlement on neighbouring properties and that the defendant would be required to take all reasonable preventative steps to prevent damage to the plaintiff's property.

Quinot[270] ponders whether the unconvincing nature of policy decisions raised by the majority in ***Steenkamp***[271] and the *obiter* references to future compensation under PAJA perhaps hint at other unexpressed considerations. The views expressed by Sachs J in his reluctance to encourage the development of private law remedies and the constitutional impermissibility of duplicate remedies in terms of private law and the Constitution[272] resonate very strongly according to Quinot[273] with the 'foundational ruling' of the Constitutional Court in ***Pharmaceutical Manufacturers Association of SA and Another: in Re ex Parte***

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[263] 1979 (2) All SA 270 (A) ('***Administrateur Natal***').
[264] [1985] 1 All SA 347 (A) ('***Lillicrap***').
[265] 2000 (3) SA 1049 (SCA) ('***Bakkerud***').
[266] 2001 (3) SA 1247 (SCA) ('***Olitzki***').
[267] 2007 3 SA 121 (CC) ('***Steenkamp***').
[268] 2002 (6) SA 180 (CPD) ('***Faircape CPD***').
[269] ***Delmas v Boshoff*** supra note 237.
[270] Quinot, Geo 'Worse than Losing a Government Tender: Winning it' (2008) 19(1) *SLR* at 117.
[271] ***Steenkamp*** supra note 267.
[272] ***Steenkamp*** supra note 267 at paragraph 99 and 101.
[273] Quinot supra note 270.

President of the Republic of South Africa and Others[274] where the existence of two parallel systems of law, being the Constitution and the common law, was emphatically rejected: there is one system of law and that is shaped by the Constitution. As such the compensation sought and now found in PAJA could have been grounded directly on the Constitution.

The above illustrates the difficulties of the law of delict in dealing with environmental harm: damages are quantified with reference the reduction in value of the property which is qualitatively and quantitatively unconnected with the harm to the environment, there is no guarantee that the amount of damages awarded will be spent in rehabilitation of the environment, the quantification of damages is calculated *ex post facto* i.e. without reference to future environmental degradation, and finally case law indicates an overwhelming reluctance to award damages against the state. Given the above, it would appear that the law of delict is unlikely to be an effective remedy in the present instance. Unless the court is prepared to develop the common law and to calculate the quantum of damages with reference to the rehabilitation costs, and then to monitor compliance and execution of the order by means of a structural interdict, it is submitted that a delictual damages claim would be inappropriate in the present circumstances. Some suggestions as to how it could be used in conjunction with a structural interdict as an innovative form of constitutional damages are discussed below.

2.3.3. Law of nuisance and neighbour relations

The law of nuisance needs to be analysed next: can the water pollution from inadequate sanitation in informal settlements be said to constitute nuisance as defined and hence be actionable at common law?

The term 'nuisance' has been imported into our law from English law. It refers to the unlawful interference with the use or enjoyment of property. In order to qualify as unlawful, and to give rise to a cause of action the interference must be substantial and material. At the core of the law of nuisance is the requirement of striking a balance between the competing interest and rights of neighbouring landowners. The question that needs to be answered is whether the water pollution as a result of inadequate sanitation in informal settlements results in a

[274] 2000 2 SA 674 (CC) at paragraph 44 cited by Quinot supra note 270 at 117.

substantial and material interference with the use or enjoyment of neighbouring landowners so as to qualify as a nuisance as defined in terms of the common law.

In ***Rademeyer***[275] the court cites Van der Merwe and Olivier[276] who state that the undisturbed use and enjoyment of property is one of the incidences of ownership; and where this use and enjoyment is disturbed repeatedly or 'persistently interfered with', one deals with nuisance.

The law of nuisance has frequently been invoked to halt or prevent conduct that causes or gives rise to damage to the environment, including water pollution[277] and land contamination.[278] Purely aesthetic considerations were held to be irrelevant in the law of nuisance.[279]

In ***Regal v African Superslate (Pty) Ltd***[280] the court, in determining whether slate waste washed by a river onto the plaintiff's land constituted an actionable nuisance, had regard to the fact that the measures required to be undertaken to prevent damage to the plaintiff's property would cause 'unreasonable hardship and undue expense', and amounted to an 'unwarranted and disproportionate heavy obligation' on the plaintiff.

Soltau[281] points out that the law of nuisance could be more advantageous as it does not require proof of fault in the form of negligence or otherwise. In particular he cites the decision in ***Van der Merwe v Carnavon Municipality***[282] as support for this contention. Interestingly this case concerned a nuisance claim arising from the seepage of oil from the defendant's property resulting in the water from a borehole on the plaintiff's property becoming unpotable and unfit for use for irrigation.

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[275] ***Rademeyer*** supra note 78 at 1017.
[276] Van der Merwe and Olivier 'Die Onregmatige Daad in die Suid-Afrikaanse Reg' 6ed JP van der Walt en Seun at 504 .
[277] Summers supra note 212 at 344 citing the decision in ***Trill v Claremont Municipality*** 1904 21 SC 362.
[278] Summers supra note 212 at 345 citing the decision in **Savoy House (Pty) Ltd v Salisbury City Council** 1959 (2) SA 645 (SR).
[279] Summers supra note 212 at 345 citing the decision in ***Dorland and Another v Smits*** 2002 (5) SA 374.
[280] ***Regal v African Superslate (Pty) Ltd*** 1963 (1) SA 102 (A) at 112E, 117A and 118A and B.
[281] Soltau supra note 157 at 40.
[282] 1948 (3) SA 613 (C).

It is submitted that the law of nuisance is unlikely to represent an effective remedy in the present instance as firstly the impact on neighbouring properties may be less significant than the damage to the environment *per se.* The quantification of damages with reference to the adverse impact on a neighbouring property may therefore bear little if no resemblance to the damage to the environment or the costs to rehabilitate it. Furthermore, as is the case with delictual damages, there is no guarantee that the damages will be spent on environmental rehabilitation.

2.3.4. Interdict

The interdict is a discretionary remedy granted pursuant to a judicial process in terms of which a person is ordered to refrain from certain conduct (a prohibitory interdict) or to undertake a particular act (a mandatory interdict). Fault is not a requirement for the granting of an interdict.[283] For the interim interdict, there needs to be a prima facie right, apprehended harm which may be irreparable, balance of convenience and the absence of a satisfactory alternative remedy.[284] The final interdict requires a clear right, an injury committed or apprehended and the absence of a satisfactory alternative remedy.

Administrative bodies have in the past used the interdict as a remedy to enforce the provisions of APPA as was discussed above in chapter 2.3.[285] In addition, the inappropriateness of delictual damages in the context of environmental degradation as illustrated in the ***Verstappen***[286] decision would be a relevant factor taken into account by a court in granting an interdict. Summers also cites the use of a mandamus as a mechanism to direct government officials of organs of state to comply with statutory prescribed duties under environmental legislation.[287] [288]

The problems associated with the granting of an interdict, are that it may be a time consuming and costly legal process,[289] it is an extraordinary measure that is granted with

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[283] Kidd supra note 27 at 131.
[284] Summers supra note 212 at 352 citing the decision in ***Verstappen***.
[285] Supra pages 51-52
[286] ***Verstappen*** supra note 48.
[287] Summers supra note 212 at 356.
[288] De Ville, Jacques '*Judicial Review of Administrative Action in South Africa*' (2005) LexisNexis Butterworths at 362.
[289] Kidd supra note 210 at 42.

caution only if all the requirements are met,[290] it may be denied on the basis that it is not urgent,[291] and that alternative remedies exist. A dispute of fact may be fatal to the application for an interdict.[292] This could be the case in the present matter as to where the pollution originated.

2.3.5. Structural interdict

The structural interdict is a complicated version of the interdict, and involves continued participation of the court in the implementation of its orders and its purpose is the elimination of systemic violations existing particularly in institutional and organization settings; in addition it is flexible and gradual.[293] The courts have in certain instances been prepared to issue a structural interdict: ***Kiliko v Minister of Home Affairs***[294] and ***Thozamile Eric Magidimisi v The Premier of the Eastern Cape***.[295] The use of the structural interdict may particularly be appropriate where systemic lethargy is evident on the part of the government. Mbazira[296] cites the decision in ***Sibiya and others v DPP***[297]and ***S v Makwanyane***[298] decisions in support of this. In the instance of socio-economic rights the High court had granted structural interdicts in the ***Grootboom***[299] and ***Minister of Health v TAC***[300] cases the Constitutional Court has expressed a reluctance to grant structural interdicts.

Whilst some of the arguments against the use of the structural interdict may be compelling, notably that it amounts to a breach of the doctrine of separation of powers,[301] it appears to be an appropriate remedy in the present instance, given the reluctance and tardiness of local government to deal definitively with the infrastructural upgrades to sanitation and sewerage systems to ensure that untreated sewerage does not find its way into our rivers.

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[290] Summers supra note 212 at 346.
[291] Summers supra note 212 at 357.
[292] Summers supra note 212 at 357.
[293] Mbazira supra note 231 at 176-180.
[294] 2006 (4) SA 114 (C) 127 ('***Killiko***') at paragraph 32.
[295] Case Number 2180/04 ('***Thomazile***').
[296] ***Mbazira*** supra note 231.
[297] 2005 8 BCLR 812 (CC).
[298] 1995 3 SA 391 (CC).
[299] ***Grootboom*** supra note 58.
[300] 2002 (5) SA 721 (CC) ('TAC').
[301] ***Mbazira*** supra note 231 at 223.

Mbazira[302] cites a number of forms that the structural interdict may take of which the 'expert remedial formulation model' and the 'report back to court model' appear to be the most appropriate in the present context. In the context of Hout Bay for instance, this would essentially entail the court would ensure on an ongoing basis that progress is made in researching and identifying the extent of the infrastructural upgrades required; that effective consultation occurs between the City of Cape Town and SANParks (being owners of the land in question), that consultation occurs and approvals be obtained from the various departments within the City of Cape Town such as (health, engineering, sanitation, housing, finance, legal, disaster and risk management); that decisions are taken at the appropriate level within the City of Cape Town, that the requisite infrastructural upgrades be put out to tender and that tenders are awarded. The structural interdict in the context of Hout Bay would serve to ensure that the infrastructural upgrades to address the water pollution issues are realized as opposed to becoming buried under bureaucratic red-tape. It is furthermore submitted that the degree of involvement by the court would be influenced by the size and sophistication of the organ of state involved: smaller municipalities may require more supervision and 'hand holding' than larger metropolitan councils.

2.4. Problems in enforcing judgements against the State

The seriousness hereof is well expressed in ***Head of Department, Department of Education, Limpopo Province v Settlers Agricultural High School:***[303] 'If governments do not obey the court, they cannot expect citizens to do so.'

Malherbe and Van Eck[304] point out that holding the state accountable for its action's and inactions is essential to the survival of our democracy, and being satisfied with a democracy that exists on paper will not be sufficient to ensure that democracy survives in South Africa. This concept is enforced by the provisions of section 165(5) of the Constitution which explicitly provides that organs of state are bound by court decisions and orders. They state

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[302] ***Mbazira*** supra note 231.

[303] 2003 11 BCLR 1212 (CC) paragraph 14 cited by Malherbe, Rassie and Van Eck, Michelle 'State non-Compliance with Legal Duties: the Constitutional Court Finally Cracks the Whip' (2009) 1 *TSAR* 291-299.

[304] Malherbe, Rassie and Van Eck, Michelle 'The State's Failure to Comply with its Constitutional Duty and its Impact on Democracy' (2009) 2 *TSAR* at 211, 214, 217 and 222; see also Malherbe, Rassie and Van Eck, Michelle 'State non-Compliance with Legal Duties: the Constitutional Court Finally Cracks the Whip' (2009) 1 *TSAR* 291-299.

that the number of cases in the last decade in which the state has failed to comply with its duties 'is indeed staggering'; it is accordingly evident that existing control mechanisms have not prevented the state from acting outside the scope of the constitution and have not ensured state compliance with its constitutional and legal duties.

Roos[305] echoes this concern by stating that the executive branch of government has often willfully failed to comply with court orders or dragged its feel in doing so. She points out that 'successful litigants against the state are often left with no recourse to enforce an order which they have obtained after costly litigation and, inevitably, the effectiveness of the legal system is brought into question if no real relief can be granted against the state.'

In ***Modder East Squatters and Another v Modderklip Boerdery (Pty) Ltd, President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd***[306] the court cited the decision in ***Fose***[307] and held that the 'courts have a duty to mould an order that will provide effective relief to those affected by a constitutional breach.' De Beer and Vettori[308] point out that such power is in fact granted in terms of section 38, 172(1)(b), 167(7), 173 and 8(3) of the Constitution. The authors continue by stating that the judiciary has perhaps displayed unnecessary caution with regard to crafting orders to ensure compliance. They cite the decisions in ***Minister of Health v TAC***[309] and ***Rail Commuters***[310] in support of this contention. In both cases, the courts were faced with the failure by government to fulfill its constitutional obligations. In both instances the courts limited themselves to a declaratory order, whereas the authors argue that a structural interdict would have been more appropriate; failure to do so in fact, according to the authors would render justiciable socio-economic rights a mockery.

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[305] Roos, Rolien 'Executive Disregard of Court Orders: Enforcing Judgements Against the State' (2006) 14(4) *SALJ* at 744.
[306] (187/03, 213/03) [2004] ZASCA 47; [2004] 3 All SA 169 (SCA) (27 May 2004) ('***Modderklip***') at paragraph 42.
[307] ***Fose*** supra note 142.
[308] De Beer, RJ and Vettori, S 'The Enforcement of Socio-Economic Rights' (2007) 3 *PER* 8-10,13.
[309] 2002 (5) SA 721 (CC).
[310] ***Rail Commuters*** supra note 110.

3. Resource and capacity constraints as a valid defence

The analysis above dealing with the Constitution and specific statutes indicate that an organ of state may well be held liable for the water pollution in informal settlements as a result of inadequate sanitation. Organs of state may reluctantly admit that inadequate sanitation in informal settlements constitutes a breach of constitutional and statutory provisions. However, the perennial favourite of resource and capacity constraints may well be raised as a defence. But just how convincing is this?

In ***Soobramoney v Minister of Health (KwaZulu-Natal),***[311] the Constitutional Court acknowledged that the obligations imposed on the state by section 26 and 27 of the Constitution are dependent on the availability of resources required for such purposes and that the corresponding rights are therefore dependent on the availability of such resources. An unqualified obligation on the state to meet these needs would therefore not presently be capable of being fulfilled. This decision was cited with approval in the ***Mazibuko Supreme Court***[312] decision where it was held in the context of the right to water supply that the authorities in order to discharge their constitutional obligations are required to act reasonably and to progressively fulfill their obligations: in particular in formulation their policy with regard to the supply of water regard would have to be had to the available resources, the competing interests and to strike a reasonable balance between those interests. The Constitutional Court in ***Mazibuko***[313] referred to the decision in ***Grootboom*** where the court rejected the notion that the socio-economic rights in the Constitution as subject to a minimum core as contemplated in General Comment 3 (1990) of the United Nations Committee on Economic, Social and Cultural Rights. In the present instance, in the context of a quantity of water that would constitute the content of the right in section 27(1)(b) is according to the court an argument similar to the minimum content and must according to the court also fail. This according to the court is evident from the wording in section 27.

In ***Grootboom***[314] the Constitutional court cited the ***Certification***[315] judgement where the Constitutional Court held that socio-economic rights are expressly included in the bill of

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[311] 1998 (1) SA 765 (CC) at 11 ('***Soobramoney***').
[312] ***Mazibuko*** supra note 71 at paragraph 26-27.
[313] ***Mazibuko*** supra note 71 at paragraph 49-56.
[314] ***Grootboom*** supra note 58.
[315] ***Certification*** supra note 67.

rights and cannot exist on paper only; this is dictated by section 7(2) of the Constitution. The court commented further that the enforcement of these rights would often given rise to budgetary implication but that that cannot be a bar to its justiciability, and at the very minimum these rights should be negatively protected from improper invasion.[316] The question according to the court is not whether these rights are justiciable but how to enforce them in a given case.

In ***Hichange***[317] the court held that lack of resources is not a sufficient reason for lack of enforcement. In particular the court rejected the pleas by the department concerned that it lacked the necessary expertise to carry out the functions with the legislature had specifically entrusted to it, is no answer and described it as a 'groundless plea ad miserecordiam'.

More recently the Constitutional Court in ***Nokotyana***[318] had opportunity to consider the provision of socio-economic rights and service delivery at municipal level. It was contended that the 'true difference between the parties is the practical implementation of measures to achieve the applicants' constitutional rights, not their entitlement to these rights. Thus, it is contended, the real question for consideration is whether the Municipality has been unreasonable in declining to provide the services claimed within the time-frame and to the extent that they are claimed.' The Constitutional Court sadly did not comment on the implementation policy of the Municipality as it regarded is as 'neither necessary nor proper to pronounce on the reasonableness or rationality of the policy'. Furthermore, whilst acknowledging that it may be tempting to order the Municipality to accept the assistance offered by the provincial government to improve the lives 'of at least the applicants before this Court, by describing their situation as exceptional and unique.' The Court held that this was unfortunately not the case as there were numerous other informal settlements within the area of jurisdiction of the municipality and it would accordingly not be 'just and equitable to make an order that would benefit only those who approached a court and caused sufficient embarrassment to provincial and national authorities to motivate them to make a once-off offer of this kind.' The Constitutional Court finally concluded that the delay by the MEC in deciding whether to upgrade the settlement or not was the most immediate reason for the dilemma and desperate plight of the residents. The Constitutional Court accordingly

[316] ***Certification*** supra note 67 at paragraph 20.
[317] ***Hichange*** supra note 54.
[318] ***Nokotyana*** supra note 130 at paragraphs 35, 52 and 54 referring to section 172(1)(b) of the Constitution and 57.

considered it 'just and equitable' to order the MEC to make a final decision within 14 months from the date of order.

The rights in issue in the ***Grootboom,***[319] ***Soobramoney,***[320] ***Nokotyana***[321] and ***Mazibuko***[322] decisions referred to above were those contained in sections 26 and 27 of the Constitution. Section 26(2), 27(2) specifically contemplate the state taking reasonable legislative and other measures within its available resources to achieve a progressive realization of these rights. Similar provisions can be found in the constitutional property clause in section 25. As such resource and capacity constraints are specifically authorized by the Constitution and can subject to the guidelines outlined by the courts above be used as a justification where these rights have not been realized.

According to Gabru[323] resource scarcity does not relieve states of what the International Committee on Economic, Social and Cultural Rights terms 'core minimum obligations': 'these core minimum obligations apply unless the state can show that its resources are 'demonstrably inadequate'...even when resources are scarce, the obligation remains on the state to 'strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances'. The Constitutional Court in the context of socio-economic rights has however explicitly in ***Grootboom***[324] and ***Mazibuko***[325] rejected application of this core minimum content in our law as this would afford a right to claim these constitutional rights immediately from the state.

The question that arises, is does this same logic apply to the environmental right? Feris[326] points out that section 24 differs from the socio-economic rights in that it is not limited by the requirement that the state should take measures 'within its available resources'. In theory therefore no constitutional justification of capacity and resource constraints exist in section 24; in practice this may not be the case. It is submitted that this support a conclusion that a violation of the constitutional environmental right such as water pollution of rivers arising

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[319] ***Grootboom*** supra note 58.
[320] ***Soobramoney*** supra note 311.
[321] ***Nokotyana*** supra note 318.
[322] ***Mazibuko*** supra note 71
[323] Gabru supra note 65 at 10.
[324] ***Grootboom*** supra note 58 at paragraph 32
[325] ***Mazibuko*** supra note 71 at paragraph 56
[326] Feris, Loretta 'The Socio-Economic Nature of section 24(b) of the Constitution – Some Thoughts on HTF Developers (Pty) Ltd Minister of Environmental Affairs and Tourism (HTF)' (2008) 23 *SAPR/PL* at 204.

from untreated sewerage emanating from informal settlements should only be justified on the grounds of capacity and resource constraints of the state in very exceptional circumstances and not as a blanket immunity for the state to shirk its constitutional obligations. Feris further[327] in the context of the decision in ***HTF Developers***[328] where the wording in section 24 was regarded as having an aspirational form, rejects this notion and affirms that the interpretation to be afforded to the rights in section 24 'fall within the realm of real expectations'.

The boldness of Leach J in ***Mahambehlala v MEC for Welfare, Eastern Cape, and Another***[329] in rejecting the contention that lack of resources and infrastructure caused the delay in granting or processing welfare grants is very reassuring where he describes it as 'administrative sloth and inefficiency which currently bedevils the Department of Welfare of the Eastern Cape'. Leach J similarly held forth in ***Mbanga v MEC for Welfare, Eastern Cape, and Another.***[330] This matter also concerned the delays in processing welfare payments. He refers to the administrative inefficiencies as being 'the tip of the iceberg' and berates the administrative inefficiency, and reaches a crescendo of scathing criticism when he states that 'Public servants are, as their very name implies, there to serve the public: not to sit inert and immobile, doing little apart from drawing their salaries and pensions. It is truly a disgrace that public servants in the employ of the Department of Welfare of this province are daily guilty of the widespread abuse of the human rights of others, rights enshrined in the Constitution which should zealously be protected and enforced.'

Gabru[331] concludes by stating 'whether the Bill of Rights fulfils its true potential will depend, to a large extent, on whether judges will discover in themselves the courage and imagination to engage in these challenges.'

It appears therefore that case law seems to suggest a growing intolerance towards a lack of delivery and accountability based on capacity and resource constraints. This becomes more apt when one considers that no constitutional tolerance towards these constraints can be found in section 24 unlike section 25-27 of the Constitution. A further arrow in the proverbial

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[327] Feris supra note 326 at 205.
[328] ***HTF Developers*** supra note 46 at paragraph 17.
[329] 2002 (1) SA 342 (SE) at 352B.
[330] 2002 (1) SA 359 (SE) at 369.
[331] Gabru supra note 65 at 33.

bow can be found in the legislation dealing with the rights and obligations of local government, discussed below.

Section 84 of the Local Government: Municipal Structures Act[332] sets out the powers and functions of local and district municipalities, in particular it is charged with the responsibility of integrated development planning (section 84(1)(a)), domestic waste-water and sewage disposal system (section 84(1)(d)). More importantly it has the power with regard to the 'imposition and collection of taxes, levies and duties as related to the above functions' in terms of section 84(1)(p). Given that the municipalities are entitled to collect revenue for the due fulfilment of their obligations, how can they then raise resource, in the form of fiscal resources as a capacity constraint?

Section 4(1) of the Municipal Systems Act affords a municipality the right to finance its affairs by charging fees for services. Section 23 and 25 obliges a municipality to prepare and adopt an integrated development plan which inter alia is to ensure that the objects of local government as set out in section 152 of the Constitution are met. This *inter alia* includes in terms of section 152(1)(d) a safe and healthy environment. Section 26(h) specifically states that this would include a financial plan. Section 74 in turn dealing with the tariff policy specifically authorises poorer households and communities to be subsidised by weather households. It is submitted, given the afore going that given the municipalities' legislative competence to raise and manage its own income stream and given the express authorisation to cross subsidise, it cannot validly raise financial constraints as a defence against the liability for inadequate sanitation in informal settlements.

4. Conclusion

This paper analysed the legal liability of organs of state as a result of water pollution due to inadequate sanitation in informal settlements. An analysis of the relevant provisions of the Constitution resulted in the conclusion that such pollution constitutes a violation of the environmental constitutional right. The conclusion was further reached that litigants would be well advised to co-join various organs of state as co-defendants, and that it would be incumbent on the organs of state having regard to the co-operative governance provisions of the Constitution, to apportion liability amongst themselves. Whilst environmental interest

[332] Act 117 of 1998.

groups and ratepayer associations in theory do have legal standing to enforce the environmental constitutional rights, the case law examined revealed that the courts have in the past not given effect thereto, as such prospective litigants are advised to present the court with detail arguments in this regard. An analysis of the case law and the relevant provisions of the Constitution indicate an increasing emergence of a concept of 'constitutional damages' which is submitted would be appropriate in the present context.

An analysis of NEMA and the NWA revealed that the pollution in question constitutes a breach of the duty of care provisions contained in section 28 of NEMA and would fall foul of the provisions of section 151 of NWA. Whilst in theory it would appear possible to act against organs of state in terms of NEMA and NWA pursuant to a breach of the above sections by requesting the issuing of directives in terms of section 28 of NEMA or section 19 of NWA, these acts are not intended primarily to enforce compliance by the state. It was noted above that it would be unlikely that a court will invoke the sanctions afforded by these acts in the event of non-compliance with the directives (such as criminal and civil liability) against organs of state and its employees. It is not recommended that these remedies be excluded by litigants in their pleadings, however, the paper cautions against relying on these as a sole remedy.

The analysis of the common law also revealed that whilst theoretically available, the law of delict and nuisance are not primarily intended to compensate or prevent environmental harm such as water pollution. This is due to problems associated with the quantification of damages being unrelated to the harm to the environment and that these remedies are primarily intended as among individuals and not in favour of the environment, which is not a legal entity. The discussion surrounding the interdict, and particularly the structural interdict, indicated that these remedies would appear more appropriate in the current context. The use of a structural interdict where the courts are involved in the ongoing monitoring to ensure that the content of a court order is given effect to is particularly apt in the present context given the outcome of the discussions surrounding the difficulty in enforcing judgements against the state.

It is accordingly suggested that a remedy based on the *action legis Aquiliae* be used, but that the concept of constitutional remedies be used to modify this common law remedy and overcome the limitations with regard to the person to whom the damages should be awarded

and that the quantification thereof be done with reference to the harm to the environment as opposed to patrimonial loss. It is further suggested that the damages thus awarded should be earmarked to fund the infrastructural upgrades and remediation to address the existing pollution and prevent further pollution. The use of a structural interdict to ensure compliance herewith is further recommended.

Finally the paper indicated the important role that the courts play in ensuring that water pollution in informal settlements as a result of inadequate sanitation is not condoned on the basis of resource and capacity constraints or bureaucratic inefficiencies. It is accordingly hoped that the courts will act with the requisite vigour to ensure that the spirit, purpose and objects of the Constitution are given effect to and that organs of state are compelled to address the water pollution emanating from informal settlements as a result of inadequate sanitation. Given the scarcity of our water resources, this is not a luxurious indulgence to give effect to the Bill of Rights, it is a necessity.

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